printed by [redacted]dward-fitzgerald.com (Basic edition)

ID vLex: 805147017
http://ie.vlex.com/vid/moore-v-attorney-general-805147017

Moore v Attorney General for the Irish Free State

Heard in a higher court: Appeal declared inadmisible by Moore v Attorney General for the Irish Free State

Jurisdiction: Ireland

Court: Supreme Court (Irish Free State)

Judgment Date: 01 January 1935

Reported In: [1934] IR 44, 69 ILTR 159 , [1934] IR 44 (Digest)

Date: 01 January 1935

Moore v. Attorney-General and Others.
ROBERT LYON MOORE and Others
Plaintiffs
and
THE ATTORNEY-GENERAL FOR SAORSTÁT saorstátÉIREANN éireann,WILLIAM GOAN and Others, Defendants [(1)]

Supreme Court.

Several fishery - Tidal navigable waters in Donegal - Claim to fishery disputed and public right asserted - Whether fishery "put in defence" prior to legal memory - Historical and legal possibility of fishery having been"put in defence" - The Brehon Laws - Application of Magna Charta to Donegal - Magna Charta, chap. 16—Landed Estates Court conveyance - Construction of conveyance - Parliamentary title - Grant by the Crown of several fishery in tidal waters within legal memory - Whether validated by the "Plantation" statutes - Principle of

construction of "Plantation"statutes - Whether fishery within the application of the "Plantation"statutes - 10 Car. 1, c. 3 - 10 Car. 1, sess. 3, c. 2 - 10 Car. 1, sess. 3, c. 3 - 15 Car. 1, c. 6.

The plaintiffs brought an action claiming a declaration that they were entitled to a several fishery for salmon and all other fish in the entire tidal portion of the River Erne, in the County of Donegal. The defendants were a number of local fishermen (who, in 1925 for the first time, had challenged the plaintiffs' title) and the Attorney-General of the Irish Free State, who was sued as representing the public and the State.

In their statement of claim the plaintiffs alleged that from the time whereof the memory of man was not to the contrary, the said portion of the river, and the sole and several right of fishing therein, had been put "in defence"; and that, prior to the granting of the Letters Patent get out in the statement of claim, the said right of fishing had been vested in, and was part of the possessions of, the Kings and Queens of England as Lords of Ireland. The statement of claim then set out a large number of documents upon which the plaintiffs based their claim. Among these the plaintiffs relied upon a Landed Estate Court conveyance of 1869 as conferring on them a parliamentary title; and they also relied upon certain statutes of Charles I whereby titles passed under Commissions of Grace, were validated and given statutory authority.

The defendants relied on Chap. 16 of Magna Charta as requiring that a several fishery in tidal waters must have been put "in defence" prior to the death of Henry II, and they contended that such a fishery did not in fact exist and was not historically possible in the *locus in quo*; they also denied the conclusive effect claimed by the plaintiffs for the Landed Estates Court conveyance; and they also denied that the statutes of Charles I validated the plaintiffs' title.

The plaintiffs proved in evidence that they and their predecessors in title had been in possession of the fishery for over three hundred years.

Held by the Supreme Court (Kennedy C.J., FitzGibbon and Murnaghan JJ.) that that Court had already decided in *R. (Moore) v. O'Hanrahan*[1927] I. R. 406, that the Landed Estates Court conveyance of 1869 only passed whatever fishing rights were possessed by T. C. (the owner and petitioner in the Landed Estates Court) leaving all questions as to the extent and quality of such rights undetermined, and therefore that conveyance wag not conclusive as to the plaintiffs' title, and to that view Kennedy C.J. and Murnaghan J. still adhered; FitzGibbon J. holding himself bound by that decision.

Held also, that, upon the evidence, no several fishery in tidal waters existed in Donegal prior to the death of Henry II. English law had not then been extended to Donegal, and the Brehon law which was in force there did not incorporate the feudal notion of the private ownership of

fishing in tidal waters. Accordingly the fishery had not been put "in defence" prior to the death of Henry II.

FitzGibbon J. refrained from deciding whether Magna Charta was in force in Donegal before 1612, or whether James I or Queen Elizabeth would not have had power to create a new several fishery in tidal navigable waters in Donegal after that territory had been acquired by conquest and before a Proclamation, Order in Council, or statute had been made extending the laws of England, including Magna Charta, to Donegal, or whether the principles declared in *Attorney-General for British Columbia v. Attorney-General for Canada*, [1914] A. C. 153, as applicable to newly settled colonies,

would have any application to dominions newly acquired by conquest, as was the case with Donegal at the beginning of the seventeenth century.

Held further (Kennedy C.J. and Murnaghan J.; FitzGibbon J. dissenting), that neither of the statutes relied on by the plaintiffs, 10 Car. 1, sess, 3, c. 3, or 15 Car. 1, c. 6, gave to the Letters Patent of 1639 (granted by Charles I to one of the plaintiffs' predecessors in title) any statutory authority to override the provisions of Magna Charta in respect of the fishery, and that grant did not therefore, bind the public.

Held accordingly (Kennedy C.J. and Murnaghan J.; FitzGibbon J. dissenting), that the action should be dismissed.

Malcomson v. O'Dea, 10 H. L. C. 593, and *Neill v. Duke of Devonshire*,8 App. Cas. 135, applied.

Decision of Johnston J. (reported [1929] I. R. 191) reversed.

Appeal from the judgment and order of Johnston J. (reported [1929] I. R. 191) declaring, *inter alia*, the plaintiffs to be entitled to and possessed of a several fishery for salmon and all other kinds of fish in the entire tidal portion of the River Erne in the County of Donegal from the Falls of Assaroe at Ballyshannon to the high sea or bar of Ballyshannon and the bed and soil underlying the said waters. The said order also granted the plaintiffs a perpetual injunction restraining the defendants (other than the Attorney-General) from trespassing upon the said several fishery and from fishing therein or taking fish thereout, and it ordered the defendants to pay the plaintiffs their costs of the action, such costs not to be levied against the Attorney-General in his personal capacity.

The notice of appeal by the defendants other than the Attorney-General applied for an order that the entire of the judgment of Johnston J. be reversed and that in lieu thereof it be ordered that the action be dismissed, on the grounds that the judgment and order were erroneous in law and erroneous in fact, and that the findings and judgment of Johnston J. were bad in law,

and that the said findings were against the evidence and the weight of evidence, and that the trial Judge misdirected himself both in law and on the facts in finding that the plaintiffs were entitled to the relief claimed in the action or any part thereof.

The Attorney-General at first served notice of appeal limited only to the incidence of the costs of the action. This notice applied for an order setting aside that portion of the order in the action which directed that the defendants pay to the plaintiffs their costs of the action when taxed and ascertained in so far as it imposed any liability on the defendant, the Attorney-General, to pay such costs, and for an order declaring that the Attorney-General was not liable to pay any part of the plaintiffs' costs of the action.

Upon the hearing of a preliminary objection by the plaintiffs to the competency of the appeal by the defendants other than the Attorney-General, it was held by the Supreme Court that the appeal of the defendants other than the Attorney-General was competent only to the extent of the special relief granted against them, viz. the injunctions, etc., and that an appeal against the declaratory part of the order lay solely within the competence of the Attorney-General. This decision is reported ([1930] I. R. 471). Subsequently to that decision, the Attorney-General applied for and obtained an extension of time for the purpose of serving notice of appeal against so much of the order of Johnston J. as was not the subject of his pending appeal (reported [1930] I. R. 560).

This (second) notice of appeal by the Attorney-General applied for an order that the whole of the order of Johnston J. (not the subject of his (the Attorney-General's) pending appeal) be reversed and that the action be dismissed.

Cur. adv. vult.

Kennedy C.J. :—

What I am about to read, represents the joint opinion of Mr. Justice Murnaghan and myself on all the questions for decision by the Court. I am reading it for both; but I wish to acknowledge that the great labour of putting it together has been his.

The appeal in this action has been brought by the Attorney-General against the judgment of Mr. Justice Johnston, whereby he declared that the plaintiffs were entitled to a several fishery for salmon and all other kinds of fish in the entire tidal portion of the River Erne in the County of Donegal from the falls of Assaroe at Ballyshannon to the high seas or bar of Ballyshannon, and whereby the Court ordered that the plaintiffs be quieted in the possession of the said

several fishery, and granted a perpetual injunction against the special defendants and all other persons from trespassing upon the said several fishery, or interfering with the plaintiffs in the exclusive use and enjoyment of the said several fishery.

The nature of the case has required that a great mass of documentary evidence should be tendered and oral evidence of considerable volume has been brought forward upon the historical questions involved, while the legal arguments have extended over a wide range. The points involved may, however, be dealt with under three heads. In the first place the plaintiffs claim a parliamentary title to the several fishery under a Landed Estates Court Conveyance. Failing this, they seek to make title to a several fishery according to the rules of common law as laid down in Magna Charta. In addition, they rely upon various statutes of Charles I whereby titles, passed under Commissions of Grace, were validated and given statutory authority.

By a Landed Estates Court Conveyance, dated 11th March, 1869, the predecessors of the plaintiffs in consideration of the sum of £45,520 acquired certain fisheries therein set forth and described. These several fisheries included not only those in the tidal portion of the River Erne but also other several fisheries in the inland waters of the Erne and Abbey rivers and all waters in communication therewith. It appears, however, that the several fisheries in the tidal portion of the River Erne are the most valuable —especially the salmon fishery—of all the fisheries granted by this Landed Estates Court Conveyance. The material portions of this Landed Estates Court Conveyance are set out in paragraph 17 of the Statement of Claim in this action, and they will be found in the report of an application for a mandamus heard in this Court, *R. (Moore) v.O'Hanrahan*[(1)]. In his judgment at the trial of this action Mr. Justice Johnston says [(2)]:—"I do not think that the Supreme Court intended in *R. (Moore) v.O'Hanrahan*[(1)] to decide anything as to the operative force and effect of the deed poll of 1869 other than that, in the proceedings before the District Justice, it was not final and conclusive as evidence of the complainants' title."The learned Judge is under a misapprehension. The Court did, as the report will show, find it necessary to arrive at a construction of the deed poll. Murnaghan J. there stated his opinion as to its proper construction in these words [(3)]:—

"The granting of the right, measured by reference to the former title, is quite at variance with the idea of a grant made with the full exercise of the authority of the Court and having the full sanction of the statutory title. I am, therefore, of opinion that the Landed Estates Court took the middle course of granting the several fishery rights so far as they had valid legal existence, and that the purchaser was well aware that he had obtained a title not guaranteed under the full force of an incontestable conveyance, but one which could only be founded upon the validity of the title previously enjoyed." In the view just stated he was in agreement with the judgment of Kennedy C.J., reported at p. 433 of the report. He says:—"In the second place, I am of opinion that the descriptive parcels with which we are concerned did not purport to describe a several fishery, but used equivocal terms for the purpose of covering, without

defining, the existing fishery rights of Thomas Connolly. In my opinion" (he continues),"on the true construction of the deed poll, the Court did only convey by the first description what indeed it purports to convey, namely, the salmon fishery rights of Thomas Connolly in the Rivers Erne and Abbey, whatever those rights might be, leaving all questions as to the extent and quality of such rights, if questioned, to be determined elsewhere."

On the hearing of this appeal it was again argued that the deed poll granted the several fisheries mentioned in it with all the force of a parliamentary conveyance and that the grant was not in any way limited to such property in these several fisheries as was formerly possessed by Thomas Connolly. When the case of *R. (Moore) v. O'Hanrahan*[(1)]was previously before this Court we were not aware that as far back as the year 1883 this very point upon the construction of the deed poll had been decided by the House of Lords. It appears that the diligent investigation made by the solicitor for the special defendants put him on the track of an action, *Mecredy and Others v. Alexander and Others*[(2)], and the full proceedings in that action with the judgments in the various Courts have, by the process of discovery of documents, been obtained from the plaintiffs. The action referred to dealt with a several fishery in the inland waters of the Erne which came within the literal words of the grant—the identical grant with which this case is concerned—if it were not qualified by reference to the previous title of Thomas Connolly. For the jury

found that the several fishery in question had never been enjoyed by Thomas Connolly but had, prior to the date of the Landed Estates Court Conveyance, been in the possession of the Marquis of Ely. There was indeed a remarkable divergence of judicial opinion as to the proper construction of the deed poll. The Court of Common Pleas, Morris C.J., Lawson and Harrington JJ., held that the deed poll only purported to grant whatever fishery for salmon Thomas Connolly had. The Court of Appeal, May C.J., FitzGibbon and Deasy LL.J. (Lord Chancellor Nash dissenting), reversed this decision and held that the purchaser under the deed poll obtained a parliamentary grant to the fishery in question quite irrespective of the previous title. The case went, however, to the House of Lords and the Lord Chancellor interpreted the words of the deed poll by holding "that what is given before is part and parcel of the same thing which is here again described but described in terms showing that everything which Thomas Connolly had and nothing more was meant to pass." Lords Blackburn, Watson, Bramwell, and FitzGerald agreed with the Lord Chancellor and unanimously reversed the decision of the Court of Appeal in Ireland. At the hearing before us it was sought to extract from the additional reasons given by Lord Blackburn a view that he did not adopt the construction that the grant was to be interpreted by reference to the title of Thomas Connolly. We do not think that this inference is correct but certainly there is no ambiguity in the views of Lord FitzGerald, who said:—"My Lords, looking at the subject-matter of this conveyance by itself, I entirely agree in all that has fallen from the noble and learned Earl on the Woolsack, and I adopt his conclusion that what was described here, and what was intended to be conveyed, is not a general and

exclusive fishery from one end of the River Erne to the other from its source to its mouth but that fishery which Thomas Connolly had, and which it appears equally clearly from the conveyance was in the hands of the lessees."We adhere in this point to the opinion which we have previously expressed, and we are happy in a matter of such moment to find that we are fortified by the views of the eminent authorities we have named, embodied in a decision of the House of Lords fifty years ago. There is one further point upon the construction of the deed which we desire to notice as it was made the basis of an argument put before us. It was suggested that the deed poll granted the several fishery *de facto* enjoyed by Thomas Connolly —that there was no doubt that Thomas Connolly was *de facto* in enjoyment of the fisheries in question and that he had accordingly an indefeasible title to these fisheries. This point is dealt with by the Lord Chancellor, who referred to the great difficulty in establishing the title to fisheries, and he says:—"If the purchaser knows that he takes a title which is not indefeasible, and is content to take it, no injustice is done to him, although he does not get the benefit of an indefeasable title which—if the title had been established in such a way as to justify the Court in granting it—he might have had." And again he says: "It may well be that for excellent reasons the Court may qualify the description of that subject in such a way as, on the one hand, to prevent the conveyance from taking away the right of third parties, who have never been put upon proving them, or establishing them, and against whom probably no claim whatever has been made, and to whom therefore no notice was necessarily given, and, on the other hand, taking away from the purchaser any portion of those rights which Mr. Connolly might have been able to give him."

Accordingly the plaintiffs have acquired under the Landed Estates Court Conveyance any fishery rights to which Thomas Connolly could have made title. This consideration opens up the second branch of the case which, indeed, occupied the greater portion of the hearing before Mr. Justice Johnston. It has been admitted by the Attorney-General and has in fact been proved (because at the hearing proof was insisted upon by the special defendants), that since the beginning of the reign of James I the plaintiffs and their predecessors in title have been in possession of the fishery in question. The Attorney-General has not disputed that the title of the plaintiffs can be traced to numerous Crown leases, grants and patents made at various dates between 1603 and 1639, but he contends that under the law applicable the plaintiffs have not shown any right in law to the several fisheries in question. If the law really were as stated in the *Case of the Royal Fishery of the Banne*[(1)], heard in Mich. T., 8 Jacobi, and reported in Sir John Davies' Reports, Dublin edition, 1762, p. 149, the plaintiffs' title would be very clear. For the second point stated at p. 152 to have been resolved is:—"Secondly, there are two kinds of rivers, navigable and not navigable. Every navigable river, so high as the sea flows and ebbs in it, is a royal river, and the fishery of it is a royal fishery, and belongs to the King by his prerogative; but in every other river not navigable,

and in the fishery of such river, the ter-tenants on each side have an interest of common right. The reason for which the King hath an interest in such navigable river, so high as the sea flows and ebbs in it, is because such river participates of the nature of the sea, and is said to be a branch of the sea so far as it flows . . . Also the King shall have the grand fishes of the sea, whales and sturgeons, etc., which are royal fishes, and no subject can have them without the King's special grant . . . And that the King hath the same prerogative and interest in the branches of the sea and navigable rivers, so high as the sea flows and ebbs in them, which he hath *in alto mari*, is manifest by several authorities and records." And at p. 155: "And although the King permit his people, for their case and commodity, to have common passage over such navigable rivers, yet he hath a sole interest in the soil of such rivers, and also in the fishery, although the profit of it is not commonly taken and appropriated by the King, if it be not of extraordinary and certain value, as the fishery of the Banne hath at all times been. . . . Wherefore it was resolved, that the River Banne, so far as the sea flows and ebbs in it, is a royal river; and the fishery of salmon there is a royal fishery, which belongs to the King as a several fishery . . ."

The *Case of the Royal Banne*[(1)] as reported by Sir John Davies contains the resolutions of the chief Judges of Ireland, members of the Privy Council, to whom the question was referred by the Lord Deputy. In substance the opinion of the Judges was that the fishing in every tidal navigable river in the kingdom belonged to the King by virtue of his prerogative and that he had the sole right therein. The Judges did not seem to advert to the possibility that the King was, or ever had been, limited in any way by Magna Charta.

This statement of the law as expounded in the reign of James I in Ireland is quite at variance with the law laid down in modern times by cases of the highest authority decided by the House of Lords. Yet such was the temper of the time that, even if we turn to Coke's exposition of Magna Charta contained in his Second Institutes, we find in reference to Chapter XVI—the portion dealing with fisheries—that he limits himself to these words:—"This statute, saith the Mirrour, is out of use," and he quotes from the Mirrour words to this effect. Coke himself did not venture to say that Chapter XVI of Magna Charta was heeded in the least. This statement of the law was given effect in the Inquisition of Rathmullan, 1 Jacobi (5th

September, 1603), by which it is found that "the regalities and all the fishings of the bays, ports or rivers of Donegal and Callbeg (in the County aforesaid) up to the limit of the flow of the sea of those rivers belong and appertain to the said Lord King in right of his crown (by virtue of the statute in that behalf enacted)." And it is similarly found "that all the fishings and fishing weirs of the lough pool and river called Loughearne (as well of eels as of other fish) and also all the fishings as well of salmon and herrings as of other fish in the ports or bays of Ballyshannon and Bundroyse (with all other neighbouring places, bays and ports in which fish are wont to be caught) belong and appertain to the said Lord the King in right of his crown and from the said

Lord the King for a long time are concealed and unjustly withheld and they are worth yearly besides deductions 20*s*. sterling." It will be necessary to return to the consideration of this Inquisition, but we refer to it now because it is obviously based upon the view of the law stated in Davies' Reports.

There is, however, no question as to the law which we must apply, as it has been declared several times in the House of Lords. The Great Charter was transmitted to Ireland in the reign of Henry III in a form somewhat different from that published by King John in England, but the latter has for centuries been held to apply to Ireland. Poynings' Act applied to Ireland the statutes lately made in England, and this description will include the statutory confirmations of the Great Charter made at various times in England. Magna Charta prohibited the recognition of a several fishery in tidal rivers unless the several fishery had prior to the death of Henry II existed as the possession of some private individual, or unless the public had already at that date been excluded by the Crown. In *Malcomson v. O'Dea*[(1)], dealing with a several fishery in Ireland, the provisions of Magna Charta on the subject-matter in hand were fully dealt with, and affirmed as law. The same statement of the law will be found in*Neill v. Duke of Devonshire*[(2)]. In this case Lord Blackburn[(3)] quoted with approval this passage from *Malcomsonv. O'Dea*[(1)]:—"It is not law, and this can never be too often repeated, that the Crown cannot grant a several fishery in tidal waters since Magna Charta. Such a statement is illusory and contrary to law. It can grant a several fishery in such waters since Magna Charta, if that fishery existed before Magna Charta. If a tidal river in which there

was *prima facie* a right in the public to fish was appropriated by an individual or by the Crown before Magna Charta, that individual or the Crown, if the Crown has got it back, can grant it after Magna Charta."

Under the law as now authoritatively laid down, in order to sustain their claim to the several fishery the plaintiffs must prove as a matter of fact by reasonable evidence that a several fishery in the tidal waters, the subject-matter of this action, was appropriated by the Crown itself or was in fact possessed by some one else prior to the year 1189. Willes J. in the opinion of the Judges delivered in the House of Lords in *Malcomson v.O'Dea*[(1)] explains the kind of evidence that is reasonable proof of a fact reaching back far into the dim recesses of the past. He says: —"If evidence be given of long enjoyment of a fishery, to the exclusion of others, of such a character as to establish that it has been dealt with as of right as a distinct and separate property, and there is nothing to show that its origin was modern, the result is, not that you say, this is a usurpation, for it is not traced back to the time of Henry II, but that you presume that the fishery being reasonably shown to have been dealt with as property, must have become such in due course of law, and therefore must have been created before legal memory."

There is, however, an insuperable difficulty in the way of holding that any such separate fishery was appropriated by the Crown as far back as the year 1189, and the plaintiffs do not suggest that any such appropriation was made. It is a matter of historical knowledge that Tirconnaill was not conquered by England for almost four hundred years after the death of Henry II. In the *Case of Tanistry*[(2)], heard in Hil., 5 Jacobi, Sir John Davies' Reports, Dublin Edn., 1762, at p. 101, it is stated: "But as to the introduction of the common law of England into this Kingdom of Ireland, it is to be observed that as this island was not fully conquered and reduced to subjection of the crown of England, all at one time, but by parcels, and in several ages; so the common law of England was not communicated to all the inhabitants, *simul et semel*,but from time to time, and to special persons and families of the Irishry, to whom the King was pleased to grant the benefit and protection of his laws." The submission of Manus O'Donnell, Chief of Tirconnell, in 35 Henry VIII is the earliest date at which it is suggested that in reality and in fact Tirconnaill became subject to the Crown of

England. The date at which English law was first extended to Tirconnaill may be gathered from the citations made in the *Case of Tanistry*[(1)] (Sir John Davies' Reports, Dublin Edn., 1762, p. 106). After citing 40 Ed. 3, he goes on to say:—

> "And although by the same statute of Kilkenny, the Brehon law, which was the common law of the Irishry, was declared to be no law, but a lewd custom, yet it was not utterly abolished amongst the Irish, but only defended and prohibited to be used amongst those who were of English race, and the Irish were left at large, to be ruled by their barbarous customs as they were before.
>
> After the making of this statute of Kilkenny, in all other statutes made in the time of the several kings, until the time of Hen. 8., where any mention is made of the troubles and wars in this kingdom, the English are called rebels, and the Irish are called enemies.
>
> But after the Act of 33 Hen. 8. c. I. by which it is recited, that although the King of England, by the name of lord of Ireland, had all manner of royal power and jurisdiction in this land, yet inasmuch as he had not assumed the name and stile of King, the Irish inhabitants of this realm had not been so obedient to the King of England and his laws as by right they ought to be: wherefore it is enacted that king Hen. 8., his heirs and successors, should always be Kings of Ireland, and have the name stile and title of king in this land, with all honours prerogatives and dignities appertaining to the state and majesty of king, as united and annexed to the imperial crown of England. After the making of this Act, the said difference of English rebels and Irish enemies is not to be found of record, but all the meer Irish were from thenceforth accepted and reputed subjects and liege-men to the kings and queens of England, and had the benefit and protection of the law of England, when they would use or demand it."

Sir John Davies interprets this Act, 33 Hen. 8., as extending the law of England to the whole of Ireland— including Donegal. So far as the English King and the Legislature had power to apply the law of England this statute (in our opinion) did apply it. There is no doubt that the statutes dealing with the dissolution of monasteries were held to apply to Tirconnaill—as witness the Inquisition of Assaroe held in 1588. But legal declaration is not the same thing as actual fact, and it is a matter of historical knowledge that large portions of Ireland did not in fact

adopt the use of English law. To continue the quotation from the *Case of Tanistry*[(1)]:—

> "And to the end that the law of England might have a free course in and through all the kingdom of Ireland (as it is expressed in the stat. 11 Eliz. c. 9), it was provided in several parliaments, viz. 3 & 4 Phil. & Mar. c. 3 and 11 Eliz. c. 9, that commission should be awarded, and all the Irish countries which were not shire-ground before, reduced into shires and hundreds: and accordingly in the several governments of Thomas, Earl of Sussex, Sir Henry Sidney and Sir John Perrot, not only the Irish territories in the confines of Leinster, but also the entire provinces of Connaught and Ulster, being out of all shire-ground before, were divided and distinguished into several counties and hundreds, and several sheriffs, coroners and justices of the peace, and other officers and ministers of the law of England, have been from time to time constituted in these counties, by several patents and commissions under the great seal of Ireland; and by this means the common law hath been communicated to all persons, and executed through all this kingdom for several years passed."

When the *Case of Tanistry* (1) was heard in Dublin in Hilary Term, 5 Jacobi, Donegal had been shire-ground for many years. This event, as is stated in the evidence, occurred in the year 1584, and a sheriff had been sent to the town of Donegal with troops to protect him. If it was not possible to carry these statutes into complete execution nevertheless, according to the law of Ireland, the English law as in vigour in Ireland or parts of it had been proclaimed to extend to the newly-formed county of Donegal before the advent of James I to the throne.

It may be of interest to quote one other paragraph from the *Case of Tanistry* (p. 108) (1):—

> "Lastly, our lord the King who now is, by a special proclamation, in the third year of his reign, declared and published that he received all the natives of this kingdom into his royal protection, etc., by which it was clearly resolved that the common law of England is now established universally through all this kingdom of Ireland, and that all persons and possessions within this kingdom ought to be governed by the rules of this law, and that every subject shall inherit his land in Ireland by the just and honourable law of England, viz. in such manner and by the same law by which the king inherits the crown of Ireland. And by these degrees the common law was introduced and established in this kingdom."

The application of English law, even at a date long after Magna Charta, to new territory includes the provisions of Magna Charta dealing with the fisheries in tidal waters, and consequently an appropriation by the Crown cannot in such a case lawfully be made. This principle is fully recognised in *Attorney-General for British Columbiav. Attorney-General for Canada*[(1)], where it is expressly stated that the application of the law of England to a territory not previously subject to this law involves that the public right of fishing in tidal waters can be ousted only if there has been an appropriation against the public at some time anterior to the death of Henry II. The claim which is, however, put forward by the plaintiffs is that the evidence justifies an inference that the fishing in tidal waters of the river Erne was, prior to the year 1189, appropriated into private hands, and that the grant by the Crown in the reign of King James is not a creation, or attempted creation, of a several fishery, but is a transfer of property which had been in private hands prior to the death of King Henry II and which subsequently came into possession of the Crown. If these facts can be substantiated the case falls within the very terms of the principle already quoted from the speech of Lord Blackburn in *Neill v. Duke of Devonshire*[(2)].

The plaintiffs have proved that they and their predecessors in title have been in exclusive possession of the several fishery for almost three hundred and thirty years. This possession must be of enormous weight and no Court could, save for the strongest and most convincing reasons, ascribe an enjoyment so long continued to an illegal origin. In England or that part of Ireland where the English law has prevailed since the coming of Henry II the mere fact of such

possession should be ascribed to a legal origin and therefore to an appropriation prior to the death of Henry II and those who might seek to contest the legality of the origin should do so by clear and manifest proofs. In a land such as was Tirconnaill, not subject to English law, the subsequent possession has not the same weight in proving the fact required to make the origin legal in English law, viz., an appropriation into private hands during the period 1189 to 1603—but nevertheless such long continued possession justifies every assumption which can be made in support, of a legal title. We cannot help feeling that the plaintiffs' title, if it rested upon long continued possession alone, would be stronger than possession founded upon a grant from the Crown subsequent to the Inquisition of

Rathmullen. For this Inquisition, taken in 1603, is based upon the view then prevalent and expounded in Davies' Reports. At that time the Crown, ignoring the provisions of Magna Charta, claimed the fisheries in tidal waters by virtue of the royal prerogative. The infirmity of this claim is now recognised, but the possession which has endured under a Crown grant based upon it must suffer somewhat from the same infirmity.

Another serious difficulty in the way of the plaintiffs on this point is that Tirconnaill was not subject to English law for about four hundred years after 1189. The appropriation into private hands of fishing in tidal waters is part of the feudal system introduced into England by the Normans. No such right was recognised in Roman law, under which fishing in such waters was considered to be *iuris publici*. This is noted by Sir John Davies, *The Case of the Royal Fishery of the Banne*[(1)], at p. 150, where he refers to the rule of the civil law "that *Flumina et portus publica sunt, ideoque jus piscandi omnibus commune est in portu fluminibusque*, which rule is found in Bracton, lib. 2, cap. 12." (In Bracton, Totell's edition, 1569, Fol. 8 r.) In Tirconnaill, during the period we are considering, the Brehon law was in force—that is from the year 1189 until the introduction of English law. The material point, therefore, is to determine whether under the Brehon law all appropriation of the fishing in tidal waters was possible, because if such an appropriation was not possible, it makes it extremely improbable that an appropriation did in fact take place contrary to the recognised law.

The plaintiffs seek to establish that during the period whilst Tirconnaill was subject to Brehon law the several fishery in the tidal portion of the Erne was appropriated as the private property of the ruling princes of the House of O'Donnell and the princes of the ruling family prior to the accession of the O'Donnell to the rank of prince. In support of this argument they refer to an Exchequer Inquisition, 26th November, 1588, held to ascertain the property of dissolved abbeys. This Inquisition finds:—

"There is a certain abbey monastery or house of monks of the Order of Saint Bernard in the town of Asseroe near Bealashennon in this County of Downegall," and they (the Jurors) "say that the Abbot and Convent of the Abbey aforesaid had in right of their abbey or house

aforesaid liberty for two fishermen to fish for salmon in the place of the stream or river called the Erne which is

called Asseroe near Bealashennon every year during times in which salmon are caught. And the second cast or draught (in English the second draught) of all the fishermen at Asseroe when they begin to fish and liberty for one skiff for fishing for salmon or other fish from the island up to the sea below which fishing is of the yearly value of three shillings and four pence sterling money of England aforesaid which premises are temporalities of the Abbey aforesaid in the said County of Downegall." This Abbey, it should be observed, did not enjoy the several fishery claimed by the plaintiffs, but the suggestion is that, as the owner of a several fishery in English law could create somewhat similar rights by grant out of his several fishery, the proper inference is that the rights of the Abbey were created by the owner of a several fishery. This argument, however, is not of any value unless it can be shown that by the Brehon law as by the law of England a several fishery might exist in tidal waters. The Abbey of Asseroe was founded as early as 1184 by Flaherty O'Muldory— some writers say in 1178 by Rory O'Canacan—and we think it would be justifiable to infer that the Abbey rights of fishing existed from the foundation of the monastery and accordingly prior to the year 1189. Most of the monasteries sought to acquire fishing rights of some description, and these rights are mentioned in various charters and grants which were given in evidence. King John, on 1st April, 1203, confirmed to the monks of Mellifont the fishery in the water of Buni (The Boyne) the grant which he made while he was Count of Moreton. Hervey de Monte Morisco founded the Monastery of St. Mary of Dunbrothy, and by grant, dated 1175, gave lands with fishings in pools to the monastery for the benefit of the monks. In 1177 John de Curci granted to the monastery of Neddrum lands and fisheries—but all these grants were made by Normans in accordance with their own laws. Ferns Abbey was founded about the year 1150 by Dermot, King of the Leinstermen. The grant, which included lands and fisheries, was made by the counsel and assent of his princes and magnates. The Abbey of St. Mary Newry in 1159 obtained a charter from Maurice MacLochlain with the unanimous will and general consent of the nobles of Ultonia and Ergallia. It will be at once seen that all of these grants which were not made by Normans are more like legislative enactments than gifts by the private owner of a several fishery. One Inquisition, taken at Donegal 13th November, 1603, makes mention of a religious house at Clonleigh, near Lifford, and states that the inhabitants of the college lands were wont from time to time to fish in and upon the river aforesaid by a license of Lord O'Donnell for that purpose obtained with one small skiff (in English a cott) by night only at the ebb of the river (in English the ebb water). The Franciscan Monastery at Donegal was founded in 1474 and it is recorded that Hugh Roe O'Donnell gave the friars a perpetual right to fish for salmon. Both these records are altogether indefinite on the point which it is material to ascertain—viz. whether The O'Donnell had the exclusive right of fishing in the places referred to, while they may be explained as meaning that The O'Donnell was instrumental in securing the privilege for the monks in whatever might have been the form required at the time and place in question. On the other hand, Professor

McNeill and Professor Daniel Binchy gave detailed evidence showing that in the Brehon law an exclusive right of fishing in tidal waters was not recognised. Professor McNeill pointed out that in the "Ancient Laws of Ireland," Vol. V., at p. 483, among the things which are specified as the full property of every Tuath (kingdom) belonging in equal right to every condition of persons are the salmon of the place. According to the commentary"one killing of it is lawful." It is perfectly clear that, as in Roman law, the right of fishing was *publici juris*,so in Brehon law the right of fishing for salmon was vested in the inhabitants of the Tuath and an effort was made to secure equality for all by allowing each person to take one salmon. It has also been explained by Professor McNeill that, as the monks who founded the monasteries usually came from outside the Tuath, they required a kind of legislative sanction to partake of the rights belonging to the inhabitants. In fact the Abbey of Assaroe was derived through Boyle from Mellifont. Mr. Justice Johnston arrived at the conclusion that the texts stating the Brehon law were composed in the eight century and he was not satisfied that the law remained the same until the twelfth century, at which time he thought the ownership of a several fishery may well have been established; and, further, he regarded the texts of the Brehon law rather as an attempt to lay down regulations of an eleemosynary or charitable character and not as a statement of proprietorial rights, whether of a corporeal or incorporeal character.

Lawyers are so much dominated by the ideas of the system which they administer, that it is difficult to enter into the atmosphere of a code of law alien to that to which they are accustomed. What we call the feudal system was an integral part of the law administered by the Normans in England—and it may have to some extent developed in England prior to the advent of the Norman conquerors. Mr. Justice Willes, in his opinion to the House of Lords in *Malcomson v. O'Dea*[(1)], said: "There is no improbability in the early appropriation of this always valuable property, or even a more extensive fishery, either in the time of the Irish princes, or in that of the Ostmen, who in this [Limerick] and other ports displaced the ancient inhabitants, and who no doubt gave the name of Lax Wear (Leax Wær, or Lachs Wehr) to the chief accessory of the fishery, or by Henry II in his grant to the companion of Strongbow." We do not think that this expression of opinion can be transferred to the land of Tirconnaill, where, according to the evidence, the Brehon law continued to be in force until it was extirpated in the sixteenth century by the introduction of English law. The plaintiffs did not attempt to prove that a several fishery or anything equivalent to it was recognised by the Brehon law. It is impossible to recapitulate at length all the evidence given, but we are clearly of opinion that the Brehon law of the twelfth century did not incorporate the feudal notion of the ownership of fishing in tidal waters. Tirconnaill was removed from contiguity with the feudal law of the Norman invaders of Ireland, and it is, we believe, contrary both to historical fact and to legal possibility that in the time of Henry II the fishings in the tidal portion of the river Erne were appropriated into the possession of Flaherty O'Muldory or any native prince who reigned before the advent of the family of O'Donnell in the year 1202. It is pointed out in the evidence that in the sixteenth century, when the chiefs began to accept grants and

confirmations of their lands from the English, English legal ideas began to prevail in such grants although English law was not at the time fully introduced into Tirconnaill. In 1565 Calvert O'Donnell surrendered to the Queen "all regal services and rights in Connalia" [(2)]. Possibly he accepted a grant from the Queen of the territory, because in the grant made in 1600-01 to Neal Garrowe O'Donnell [(3)] the custody of the county is given to him as granted to Calvert O'Donnell except, *inter alia*, "the fishings of the Earne." This dealing with the fishery is on the same plane as the Inquisition of Rathmullan, and it appears to have been treated as a

royal right rather than private property of The O'Donnell under the Brehon law. Mention is made in an Inquisition taken at Ballyshannon in 1623 of one weir for catching eels called "O'Donnell's weare" with the appurtenances in the river Erne. This is the only reference in the documents to the O'Donnells in connection with the fisheries and it is limited to one weir for catching eels. The conclusion that no title existed in the O'Donnells to the entire fishings in the river Erne is made clear by the Inquisition at Rathmullan. No one thought of seeking a title in the Crown through the possession of any private individual because this notion was contrary to the law as conceived at the time. If the fishing in all tidal and navigable rivers belonged to the Crown by the royal prerogative, no private title could exist except by grant from the Crown and it was not necessary for the Crown to seek its title through a private title in The O'Donnell. In the grant to Neal Garrowe O'Donnell and in the Inquisition of Rathmullan the fishings in question were dealt with as regalities of the Crown.

In the earliest document dealing with the fishing as a private several fishery—the lease from King James to John Binglie for 21 years from 14th October, 1603—the King's title is based on the statement that the fishing was"parcell of the Kings Majesties auntient inheritaunce."In the Inquisition of Lifford, 21st March, 18 Jac. (1620), the fishing is described as "a Royall salmon fyshings in the sea . . . where it doth ebbe and flowe" in the precise words used in Davies' Reports. We look in vain for any reference to a several fishery in private hands which had come to the King. If any such several fishery in private hands had come to the King it would have been found, like property belonging to dissolved monasteries, to have come to the King. In the legal view prevalent the royal salmon fishery belonged to the King and it could not belong to a subject except by grant from the King.

In our opinion the plaintiffs are not entitled to an ancient fishery appropriated to private ownership prior to Magna Charta.

Their title, however, under the statutes of Charles I remains to be considered.

By Letters Patent bearing date 30th August, 15 Car. I, Thomas, Lord ffolliott, obtained a grant of very extensive tracts of land and also of the several fisheries, the subject-matter of this action. This grant is recited to have been made "according to the intention and effect of our Commission under our Great Seal of England bearing date at Canbury in our said Kingdom of

England on the first day of September in the fourteenth year of our reign." Among the numerous properties granted by the Letters Patent we find the rights formerly attached to the Abbey of Assaroe and the several fishery with which we are dealing is granted in the words following:—"And also all the Creek bay or river of Beallashenny otherwise Ballyshannon, viz.:—from the high sea to the rock in English 'the rocks or waterfall' commonly called the Salmon Leaps otherwise the fall of Asheroe near the Castle of Ballyshanny aforesaid And also all the aforesaid rock or salmon leap or fall of Asheroe with the appurtenances And also all and singular loughs weirs islands rocks in English 'Rockes' and waterfall in within or near the aforesaid Bay creek and river of Ballyshanny otherwise Ballyshannon aforesaid And all the bottom soil land and water of the aforesaid creek bay or river and all land covered and to be covered with water there and also the whole fishing and liberty of fishing and to fish for and catch salmon and all other kinds of fish whatsoever in or within the aforesaid creek bay and river aforesaid and on the rocks aforesaid And also a weir for catching eels commonly called O'Donnell's 'Weare' with the appurtenances in the river of Earne And also the liberty of having nets and other Instruments necessary for fishing on the rocks creeks river and bay aforesaid And also the liberty of carrying off all fish and catch of fish of every kind from the aforesaid rocks in English 'rockes' creeks river or bays or from any part thereof with all other liberties privileges advantages and emoluments whatsoever of whatever quality to the premises or any part thereof belonging or appertaining in the aforesaid counties of Donegall Sligoe and ffermanagh or any of them." This grant undoubtedly in terms includes the several fishery in question but on account of the provisions of Magna Charta it, standing alone, would have no legal effect. The plaintiffs, however, strongly urge that by reason of the several statutes passed in the reign of Charles I the grant so made under the King's Commission by Letters Patent was given statutory confirmation and that it is valid notwithstanding the provisions of Magna Charta.

This grant by Letters Patent to Thomas, Baron ffolliott, was mentioned in paragraph 10 of the statement of claim merely as a link in the plaintiffs' title, but by an amended statement of claim delivered on 12th July, 1928, during the course of the trial the plaintiffs pleaded that the hereditaments and premises granted as aforesaid under the Letters Patent were plantation lands in the said Counties of Donegal and Fermanagh within the meaning of 10 Car. I, sess. 3, cap. 3, and that the grant under the Letters Patent was good and valid as well against the King's most excellent Majesty, his heirs and successors, including the Irish Free state, as against all and every other person and persons whatsoever." By a further and alternative amendment the plaintiffs alleged "that the said hereditaments and premises so granted . . . lay within the plantations mentioned in the statute, 15 Car. I, c. 6, section 1, and that by virtue of section 1 of the said statute the Letters Patent were good, sufficient, effectual and indefeasible to all intents, constructions and purposes as well against His Majesty King Charles I, his heirs and successors, including the Irish Free state, as against all and every other person and persons whatsoever." And the plea went on to allege "that at the date of the said Letters Patent His

Majesty King Charles I was by sect. 1 of the said statute, 10 Car. I, sess. 3, cap. 3, and by sect. 2. of the said statute, 15 Car. I, cap. 6, absolutely and indefeasibly entitled to the said hereditaments expressed to be granted by the said Letters Patent in right of his Imperial crown." The Letters Patent include, as well as the several fishery the subject-matter of this action, a very great number of denominations of land in the Counties of Donegal, Fermanagh, Sligo and Leitrim which are all set out with great particularity, but the substance of the allegation is that the several fisheries granted were "plantation lands" under 10 Car. I, sess. 3, cap. 3, or "lay within the plantations" under 15 Car. I, cap. 6, s. 1. The Attorney-General contends that the fisheries in question were not "plantation lands" and did not "lay within the plantations" mentioned, and he further contends that the statutes referred to did not intend to repeal the provisions of Magna Charta.

A great amount of minute historical investigation was directed to the point whether the several fisheries in question were "plantation lands," but before approaching this question it is necessary to deal with an argument based upon the proper construction of the statutes referred to. This argument is that all lands and hereditaments situate in the counties of Donegal and Fermanagh, as well as other counties named in the statutes, were declared to be plantation lands. If this construction were held to be the proper one no question of fact would remain open on this point. In the construction of these statutes we have derived much help from the arguments of counsel, not only at the hearing of the appeal, but also at a subsequent argument limited to this point which we had set down. These statutes do not appear to have been judicially construed in any reported case and we desired on account of the importance of the matter to give them the fullest consideration. The importance of the point raised is apparent as it affects not only the plaintiffs but also every grantee under similar grants in the several counties named.

In approaching the consideration of these statutes it is necessary to keep in mind the causes which led up to their enactment. From the recitals contained in 10 Car. I, cap. 3, we can learn that owners of land had their titles drawn in question on widely different grounds. In some cases no grant from the Crown could be pointed to, and in other cases where Crown grants did exist objection was taken to the validity of the grants; while in the case of plantation lands it might also be contended that the lands had been forfeited to the Crown by reason of failure to observe the conditions of the plantation. By way of remedy for this state of affairs the Crown made fresh grants and in doing so seized the opportunity of increasing its revenues; while the owners desired parliamentary confirmation of the grants so obtained. The first statute, 10 Car. I, cap. 3, styled "An Act for confirming of Letters Patent hereafter to be past upon His Majesties commission of grace for the remedy of defective titles," bound the King but expressly saved the rights of others. The matters so intended to be dealt with were more fully provided for in an Act, 10 Car. I, sess. 3, cap. 2, passed as an explanation of the first mentioned statute. Another Act, 10 Car. I, sess. 3, cap. 3, was passed at the same time for securing of the estates of the

undertakers, servitors, natives and others holding lands in all and every the plantations made in the several counties specified. This is the first of the statutes relied upon in the statement of claim and we will quote the material passage upon which the argument is founded. After an elaborate recital it is enacted: "That Your Majesty your heirs and successors shall be rightly and by good lawfull and indefeasable title and estate in fee simple deemed and adjudged to be in the actuall and reall possession and seizin in right of your imperiall crown of England and Ireland of all the castles mannors lands tenements and hereditaments lying and being in the said severall counties of Tyrone, Armagh, Donegall, Fermanagh, Cavan, Londonderry, Leytrim and Longford and of and in the severall territories precincts and countries commonly known or called by the name or names of Ely O'Carroll alias O'Carrolls countrey" [Then follow similar territories]"and also of and in the several townes or villages lands tenements and hereditaments known esteemed or usually called plantation lands in or neere the territory or country of Clincol-man alias O'Melaghlins countrey" (and several territories are then similarly described) "and also of and in all the castles mannors lands tenements and hereditaments in the severall counties of Waterford, Corke, Limericke, Kerry and Tipperary aforesaid usually called plantation land or heretofore passed or mentioned to be passed by letters patent to any British undertaker or undertakers respectively as plantation lands, at such time or times whensoever any of the forementioned castles mannors lands tenements or hereditaments shall be within the space of five years next ensuing the end of this present session of Parliament new passed granted or confirmed to any person or persons bodies politique or corporate respectively, by letters patents under the greate seale of this Kingdom by warrant of the lord deputy for the time being and commissioners nominated or to be nominated in and by His Majestie's commission of grace for the remedy of defective titles now in being or hereafter to be, being former patentees or proprietors or reputed patentees or reputed proprietors or such as by former distribution assignation or appointment have taken the profits thereof their heirs or assignes respectively." This language although prolix is not involved and it is clear that the castles, mannors, lands, tenements and hereditaments in the counties first mentioned are indicated by an earlier recital. This recital runs:—"That whereas for the better governement and security of this Your Kingdom of Ireland sundry plantations have at severall times been made in the severall counties of Waterford, Corke, Limericke, Kerry, Tipperary, Wexford, Wickeloe, King's County, Queen's County, Westmeath, Leitrim, Longford, Tyrone, Armagh, Donegall, Farmanagh, Cavan and Londonderry, grounded as well upon ancient as recent title of your Crown declared as well by inquisitions as other records and evidences; upon all which divers patents have been passed, and thereby very many undertakers and others of Brittish birth and very many of the natives of best quality and condition have been there planted and settled and severall lands, tenements and hereditaments granted and disposed to corporations forts incumbents of churches schooles and other good uses."The reading of this statute contended for by the plaintiffs is that all lands, tenements and hereditaments in the counties mentioned are by it declared plantation lands irrespective of whether they were granted in

pursuance of the scheme of plantation referred to. But the literal reading of the section is not a notional vesting in the King of the entire counties named, but a notional vesting of the estate passed by the new Letters Patent (in lieu of the previous plantation grant) at the date of the making of the new Letters Patent. Further, it seems to us that the aim and purpose of this Act is shown by the recital immediately preceding the enacting words above quoted:—"And whereas it hath pleased your most excellent Majestie by your principall officers and ministers here to make known that for the better encouragement of your said subjects to proceede cheerfully in their intended course of planting and civilizing the said severall planted countries and settling a good and happy commonwealth among them Your Majesty would be graciously pleased to grant unto Your said subjects that their estates intended unto them in the said plantations should by all convenient means be secured."

The estates intended unto them in the said plantations must necessarily be estates given by plantation grants. Grants were made by the Crown of lands and other hereditaments during the years anterior to the plantation in the counties named. The construction which we are asked to place on this statute is that such grants, although not in fact plantation grants, were declared to be plantation grants. In our opinion the title of the Act itself, all the recitals and the enacting words themselves are directly opposed to any such construction. The Act deals with plantation grants and deems the King to be in actual seisin of . . . all lands . . . in the county of Donegal . . . at the date whensoever any of the same should be granted to any person or persons, "being former patentees or proprietors or reputed patentees or reputed proprietors or such as by former distribution assignation or appointment have taken the profits thereof." In reciting the plantation the statute has already used the words "upon all which divers patents have been passed . . . some other parcells of the said lands being onely distributed and assigned and not passed by reason of restraints for some years past."To our minds it is clear that the new grants under the statute are to be made to the persons who obtained lands under the scheme of the plantation, and that persons who did not obtain lands under the plantations were governed by the statute, 10 Car. I, sess. 3, cap. 2, immediately preceding.

Another statute of a comprehensive character was passed in 15 Car. I. This statute, 15 Car. I, cap. 6, "An Act for strengthening of letters patents past and to be past upon any of His Majesty's commissions of grace for the remedy of defective titles," became necessary by reason of the fact that the period of five years mentioned in 10 Car. I, sess. 3, cap. 3, was coming to an end. By this statute all Letters Patent past or thereafter to be past upon any of His Majesties commissions of grace for the remedy of defective titles were to be "deemed and adjudged to be good sufficient effectuall and indefeazable to all intents constructions and purposes"—in the words of the statute"in manner following (that is to say) for and concerning all and every the lands liberties franchises immunities and other hereditaments and premises whatsoever lying or being within every or any of the late plantations within this kingdom made by our late sovereign lady Queen Elizabeth, our late most gracious lord King James and made or to be

made by the King's most excellent Majesty that now is or by any of them as well against His Majesty, his heirs and successors as against all and every other person and persons bodies politick and corporate as well spiritual as temporal whatsoever: and for and concerning all the rest of the premisses against His Majesty, his heirs and successors onely, notwithstanding any defect whatsoever or any statute ordinance law cause matter or thing which might or may any way impeach infeeble avoid or destroy any of the said letters patents in all or any point or points whatsoever."

This statute in its express terms deals with the two subject-matters dealt with separately in the previous statutes, lands, etc., lying, or being within the plantations, and other lands, etc., which cannot he so described. It proceeds to enact that the grantees "shall and may thenceforth peaceably and quietly have hold possess and enjoy all and singular and every the lands tenements hereditaments and other the premisses lying or being within all and every or any of the plantations aforesaid and specified or mentioned in any of the said letters patents to have been granted or hereafter to be granted or mentioned to be granted as aforesaid as well against His Majesty his heirs and successors as against all and every other person and persons bodies politick and incorporate spiritual and temporal whatsoever and all other the lands tenements hereditaments and premisses mentioned to have been granted or hereafter to be granted or mentioned to be granted in any of the said letters patents as aforesaid onely against His Majesty his heirs and successors . . ." Sect. 2 of this statute, which was strongly relied upon on behalf of the plaintiffs, is framed substantially in the same way as the corresponding passages already cited from the latter portion of 10 Car. I, sess. 3, cap. 3. This sect. 2 enacts: "That His said Majesty, his heirs and successors respectively be and shall be deemed adjudged seised and vested in the actual and real seisin and possession of a good lawful indefeazable and absolute estate to him or them his or their heirs and successors in right of his and their imperial crown of and in all and singular and every the castles honours mannors towns villages hamlets lands tenements and hereditaments situate lying or being in the several counties of Tyrone, Ardmagh, Donegal, Fermanagh, Cavan, Leitrim and Longford; and likewise of all the several territories precincts of land and countries commonly known or called by the name or names of Ely O'Carrol alias O'Carrols country"(then follow a number of other territories similarly described)"and also of all the severall towns villages hamlets lands tenements and hereditaments known esteemed reputed or usually called plantation lands in or neere the territories or countries of Cloncolman alias O'Melaghlin's country in the county of Westmeath; and in or near the territory and country of Faran O'Neal in or near the county of Wexford; and of and in the towns and lands of Tourboy in or near the territory of Ranelagh aforesaid; and also of all and singular the castles honours mannors towns villages hamlets lands tenements and hereditaments in the several counties of Waterford, Cork, Limerick, Kerry, and Typerary usually called or reputed as plantation lands or heretofore past or mentioned to have been past by letters patents to any British undertaker or undertakers by birth blood or descent their heirs or assigns respectively as plantation lands, at every such time and times respectively

whensoever any of the same beforementioned castles honours mannors towns villages hamlets lands tenements and hereditaments shall be within the space of five years next ensuing the end of this present session of Parliament new passed granted confirmed released or assured or mentioned to be new passed granted confirmed released or assured to any person or persons bodies politick or incorporate spirituall or temporall respectively, by letters patents under the great seale of this kingdom by vertue or pretence of or reference unto any such commissions of grace now being or hereafter to be within this realme being either former patentees or reputed inheritors or proprietors or by former assignation distribution or appointment have taken the profits thereof . . ." The words here used are practically a repetition of those employed in 10 Car. I, sess. 3, cap. 3, in which statute, as we have said, the recitals make it abundantly clear that the grants intended to be made indefeasable as well against the Crown as against all other persons were grants made in pursuance of the scheme of plantation. The main operative words in sect. I give the indefeasible title against all persons in respect of lands, tenements and hereditaments lying or being within all and every or any of the plantations aforesaid. Sect. 2 is fully satisfied as meaning that all lands etc. in the counties mentioned are to be deemed to be in the actual seisin of the Crown at the date when the new Letters Patent under the commissions of grace may have been or may be issued within the five years following granting to the former grantees of plantation lands in these counties the same lands under a fresh grant. It is, in our opinion, impossible to extract from this section a declaration that all lands etc. in the counties named shall be deemed to be within the plantations whether they were so in fact or not. To support any such view the letters patent granted under the commissions of grace would be good against the Crown and all persons whatsoever if made to a person who had not obtained a plantation grant; but under the statute the grant should be made to a former patentee or reputed inheritor or proprietor or to one who by former assignation distribution or appointment had taken the profits thereof, the very words which in 10 Car. I, sess. 3, cap. 3, are used in reference to persons who took under plantation grants. For these reasons, in our opinion, there is no statutory declaration that all lands granted in the counties named are grants of lands, etc., lying or being within the plantations. No Court, so far as we are aware, has ever construed the statute in this sense and we do not think this construction the correct one. Accordingly, it remains to be determined as a matter of fact whether the several fishery claimed by the plaintiffs can be said to be"plantation lands" or to lay within the plantations as alleged in the statement of claim.

The documents given in evidence show the dealings with the several fishery subsequent to the Inquisition of Rathmullan which found under the law as then administered the fisheries to be part of the regalities of the Crown. Mr. Justice Johnston remarked that the documents were not easy to reconcile but we think they are consistent and show very clearly the legal dealings. On October 14th, 1603, a lease was made by the Crown to John Binglie for 21 years at a rent of 40*s*. of which 10*s*. was in respect of the rivers of Donegall and Caelbeg and 30*s*. in respect of the fishings in Lougherne and Bondrois. A certified copy of this lease from the Patent Rolls 1 Jac. I,

part 2, was given in evidence. In the Crown Rental, Ireland, 1613, mention is made of a rent of 40*s*. due from John Binglie,"gent' farmer of the whole regalities of the fishings and the fishings of the bays ports havens creeks rivers floudes and streams of Dunegall and Caelbegg And also of the whole fishing and catching of fish of the lakes pools rivers and streams called Lougherne of every kind of fish there being And also of the whole fishing for and catching of salmon and herrings and of all other fish in the ports creeks bayes and streames of Ballishannon and Boundwise with all other places bayes ports havens and creekes next adjacent in which fish were wont to be caught yearly."This lease is noted to be supposed to be a double chardy and it is also noted that Sir Henry ffolliott was assignee of John Binglie. The date of the assignment from John Binglie to Sir Henry ffolliott is not mentioned but in the Inquisition of Donegal held 21st March, 1621, 18 Jacobi I, it is stated ffolliott had been in possession for over sixteen years. Sir Henry ffolliott obtained a lease for 21 years from 7th June, 1606, of the fishing rights formerly attached to the Abbey of Assaroe, as well as the fishings in the Binglie lease, and again for 20 years from 6th July, 1607. Twenty-one years was the longest term which the Commission was empowered to grant. On 20th July, 1609, Sir Arthur Chichester, Deputy General, in pursuance of the King's letter, dated 29th November, 1608, made a grant to Mary, Baroness Delvin, and Sir Richard Nugent, her son, of lands in many parts of Ireland. One of the subject-matters granted was the fishing and liberty of fishing and the catching of salmon and all other kinds of fish whatsoever in or within the creek bay river stream or pool of Ballishannon. This grant included the rents and profits of all and singular the premises above by the same presents given. In respect of the several fishery so granted an annual payment of £6 13*s*. 4*d*. was reserved to the King. Baroness Delvin and Sir Richard Nugent by deed of feoffment, dated 20th January, 1609, granted this several fishery to Sir Henry ffolliott as is found in an Inquisition of Ballyshannon, 2nd January, 1620. On 12th April, 1608, Letters Patent were issued by Sir Arthur Chichester, Deputy General, in pursuance of a letter of King James, dated 27th October—presumably 1607— granting to Francis Gofton and his heirs the rights of fishing formerly enjoyed by the Abbey of Assaroe at the annual rent of £8 10*s*. 0*d*. On 20th May, 1608, as found in the Inquisition of Ballyshannon, 2nd January, 1620, the said Francis Gofton assigned and conveyed these fishings to Sir Henry ffolliott. As noted in the Crown Rental, Sir Henry ffolliott had obtained a lease for 21 years on 7th June, 1606, of portion at least of these fishings. By Letters Patent dated 9th April, 1622, King James made a fresh grant to Sir Henry ffolliott uniting into one grant a great many lands in his possession held under various titles.

The evidence established very clearly that Sir Henry ffolliott was an undertaker and possessed plantation lands, viz., the Manor of Newputon in the County of Fermanagh. It was, however, argued on behalf of the Attorney-General that the fisheries, the subject-matter of this action, were not plantation lands because they did not appear in Pynnar's Survey of the Plantation. This merely negative evidence hardly satisfies in a legal way the point sought to be proved, but evidence was given of the official project for the division of the escheated kingdoms in Ulster

done under the commission of King James on 23rd January, 1608, and also of the plan and conditions of the plantation. Prior to this date, viz., on 29th November, 1608 (the year then beginning in March) the King's letter for the grant to Mary, Baroness Delvin, and Sir Richard Nugent had been drawn up. This grant comprised a great number of denominations of land in Cavan but it also granted lands in Westmeath, Roscommon, Cork, Kildare, Dublin, Wicklow, the City of Dublin, Meath, King's County; much of the land granted is stated to have come to the Crown by the dissolution of monasteries, and the grant contains no trace of being a plantation grant. Indeed the date of this grant makes it impossible that it should have been made as part of the scheme of the plantation. Yet it is as assignee of this grant, so far as the fishings are concerned, that Sir Henry ffolliott derived his title, save so far as he already had the lessee's interest as assignee of John Binglie for the residue of the term of 21 years.

To prove that the several fisheries were held under plantation grants an argument of an indirect nature was put forward on behalf of the plaintiffs. It was pointed out that by the Letters Patent of 30th August, 1639, Thomas Lord ffolliott is released from all and singular the conditions covenants articles mandates instructions and agreements of the plantation and it was urged that this clause in the Letters Patent is proof that the several fisheries were granted under a plantation grant. If these several fisheries were the only premises granted the point would deserve consideration but it was truly pointed out that the grant included the manor of Newputon in the County of Fermanagh to which the clause will naturally have reference. It was also urged that by the same grant a general clause, releasing many properties, including fisheries by name from various obligations, contained a release from the obligations under the articles of the plantation. But there is no necessary inference that each named item of property must have been subject to each and every of the obligations mentioned and this clause gives no proof whatever that the fisheries were plantation lands or that they lay within the plantations. It should also be observed that in the Letters Patent of 1639 separate and distinct rents are created in respect of the Donegal lands and the Fermanagh lands. The earlier title of the Donegal lands appears from the documents and most of these lands, if not all, were derived under grants which were not plantation grants. We are accordingly of opinion that neither 10 Car. I, sess. 3, cap. 3, nor 15 Car. I, cap. 6., gave to the Letters Patent of 1639 any statutory authority to override the provisions of Magna Charta in respect of the several fisheries the subject matter of this action and accordingly the grant of these several fisheries under these Letters Patent did not bind the public.

We have to add, with reference to the statutes strongly pressed by Mr. Jellett, 31 Geo. 2, c. 13, 3 Geo. 3, c. 35, that these statutes, which refer to the private several fisheries in the Erne, had no intention of altering Magna Charta and that they cannot be relied upon for this purpose. If in regulating fisheries they referred to fisheries which were enjoyed *de facto* as several fisheries, these statutes cannot be construed as a statutory validation of these fisheries contrary to the

provisions of Magna Charta. No more did the statutes regulating fisheries or authorising the use of fixed engines intend that the question involved in this action should be incidentally determined by applications under those Acts.

With Mr. Justice Johnston we feel deeply that ancient landmarks should not lightly be removed. In this case, however, the plaintiffs put forward a title which depends upon the Inquisition of Rathmullan, the lease to John Binglie, the grant, to Mary, Baroness Delvin, and Sir Richard Nugent and the Letters Patent to Sir Thomas ffolliott. They ask the Court to declare their title and bind the public for all time. In our opinion the plaintiffs' title depends upon the view stated in Sir John Davies' Reports which was prevalent in Ireland in the times of the Stuart Kings, and was perhaps held even in England under Queen Elizabeth. In 1859 this very fishery came before the Court in *R. (Gillen) v. County Donegal Justices*[(1)]which is not a very satisfactory case but it indicates the ideas which even then prevailed. When, contrary to the law stated in Davies' Reports, the House of Lords in 1863 reasserted the provisions of Magna Charta in *Malcomsonv. O'Dea*[(2)] the foundations upon which the plaintiffs' title might be said to rest disappeared and, if we must state our opinion to be that the plaintiffs' claim is invalid, it is the decision of the House of Lords in *Malcomson v.O'Dea*[(2)] which has produced this result.

FitzGibbon J. :—

The claim of the plaintiffs in the present action is to establish their right to a several fishery for salmon and all other kinds of fish in the entire tidal portion of the river Erne in the County of Donegal, from the Falls of Assaroe at Ballyshannon to the high sea or bar of Ballyshannon, and the bed and soil underlying the said waters.

The waters in question are navigable as well as tidal, and accordingly the claim of the plaintiffs is one to an exclusive right of fishing in tidal navigable waters in Ireland. So far as England is concerned, "since the decision of the House of Lords in *Malcomson v. O'Dea*[(2)],it has been unquestioned law that since Magna Charta no new exclusive fishery could be created by Royal grant in tidal waters, and that no public right of fishing in such waters, then existing, can be taken away without competent legislation": *Attorney-General for British Columbia v. Attorney-General for Canada*[(3)]. I rather think that this "was unquestioned law" in England long before the decision in *Malcomson v. O'Dea*[(2)], and the case law upon the subject in England, of which there is an enormous volume, turns in the main upon the sufficiency of the evidence in each particular case to establish the existence of an exclusive right of fishing at a date prior to Magna Charta."If evidence be given of long enjoyment of a fishery, to the exclusion of others, of such a character as to establish that it has been dealt with as of right as a distinct and separate property, and there is nothing to show that its origin was modern, the result is, not that you say, this is a usurpation, for it is not traced back to the time of

Henry II, but that you presume that the fishery, being reasonably shown to have been dealt with as property, must have become such in due course of law, and therefore must have been created before legal memory": *per*Willes J. in *Malcomson v. O'Dea*[(1)].

Now, there seems to be no doubt that, in England, long before Magna Charta, Kings of England had in fact appropriated to themselves by an exercise of the royal prerogative which was made illegal after 1189, and had granted to their feudatories or to religious houses, exclusive rights of fishing in tidal navigable waters, and accordingly there was no intrinsic objection to the presumption of such an appropriation founded upon evidence of the character described by Willes J., and similar principles would apply in any country in which the law of England upon the subject was in force. In *Malcomson v. O'Dea*[(2)] itself, though it does not appear in the very brief summary of the evidence on p. 595 of the report, the proved title to the fishery commenced with a charter from King John dated 12th January, 1200, to William de Braosa of "the honor of Lymerick with all its appurtenances in . . . fishponds and fisheries and ponds . . . as King Henry our father that honor gave to Philip de Braosa uncle of the aforesaid William," and there is a passing reference to this grant of Henry II in the judgment of Willes J. at p. 621, showing that in one part of Ireland at least a grant had been made by an English King in exercise of his prerogative, before the date fixed by Magna Charta, of a several fishery in tidal navigable waters.

The main ground upon which the plaintiffs' claim is challenged is thus stated in par. 21 of the defence of the special defendants, and par. 1 of the defence of the Attorney-General, respectively:—"The said defendants contend that, on the true construction of the documents of title in the statement of claim set forth, the plaintiffs have not in fact shown title to a several or sole and exclusive fishery in the*locus in quo,* viz., from the falls of Assaroe to the high sea; and, further, that by the provisions of Magna Charta the Crown was prohibited from granting a several or sole and exclusive fishery in the *locus in quo* in case such was not existing therein in or before the year 1189, and any grant by the Crown contrary to the provisions aforesaid is null and void; and, further, that a several or sole and exclusive fishery in the *locus in quo* in or before the year 1189 did not in fact exist and is not historically possible; and the said documents of title and the historical evidence show

that the claim to a several or sole and exclusive fishery in the *locus in quo* is modern in origin and dates at earliest from the times of Queen Elizabeth and King James the First." "The Attorney-General for Saorstát Éireann éireann. . . denies that the tidal portion of the river Erne in the County of Donegal from the falls of Assaroe at Ballyshannon to the high sea or bar of Ballyshannon or any part thereof or the bed and soil underlying the said waters or any part thereof or the sole and exclusive or several rights of fishing for salmon or any other fish in the said waters or any part thereof had been put in defence from time whereof the memory of man is not to the contrary or at any time prior to the date of Magna Charta."

Put shortly, these contentions, to establish which a mass of historical evidence was given at the trial, are that by the law which existed in Ireland before the date fixed by Magna Charta as the latest date upon which a several fishery could be created in tidal navigable waters by an exercise of the royal prerogative, no such fishery did or could exist; that the creation of this particular fishery took place, at the earliest, in the reign of Elizabeth, when, it is alleged, such an exercise of the prerogative was prohibited by Magna Charta; and, accordingly, that its origin was modern, and therefore illegal, within the terms of the opinion of Willes J. in *Malcomson v. O'Dea*[(1)], and of the Privy Council in *Attorney-General for British Columbia v.Attorney-General for Canada*[(2)].

I shall not set out here the documentary evidence in detail, but I can say that I have examined it over and over again with all the attention of which I am capable, and I am satisfied that there is no trace of any grant by any English King or Queen before the reign of Queen Elizabeth, and the first actual grant given in evidence was one by King James I. Of course, if a several fishery had in fact existed in the waters in question before 1189, and this fishery had become vested in the Crown for the first time after that date, either by conquest, escheat, forfeiture, or otherwise, there would be no merger, and the Crown could make a new grant of it as an existing fishery, unfettered by the provisions of Magna Charta. I refer, in support of this, opinion, to the judgment of Martin B. in the *Duke of Northumberland v. Houghton*[(3)],and especially to the speech of Lord Blackburn in *Neill v.Duke of Devonshire*[(4)], where he adopts, with the full concurrence of his colleagues, Selborne L.C. and Lords

O'Hagan and Watson, the judgment of Sir Edward Sullivan M.R. in the Court of Appeal in Ireland.

The defendants have, however, undertaken the burden of proving that no several fishery did, or could under the Irish law which prevailed in Donegal or Tirconnaill until the reign of Queen Elizabeth, exist in the tidal navigable waters, of the river Erne. Upon this question I have found myself compelled to come to a conclusion of fact different from that of the learned Judge by whom the case was tried. The plaintiffs tendered no evidence upon the laws of Ireland in respect of fisheries, and the evidence of Professor John MacNeill, Dr. de Largy, and Professor Binchy, has satisfied me that there was under the ancient Irish law nothing which corresponded to the several fishery dealt with in Magna Charta and the cases of *Malcomsonv. O'Dea*[(1)] and *Neill v. Duke of Devonshire*[(2)].

It has been suggested on behalf of the plaintiffs that the appropriation of a fishery to the people of a Tuath amounted to the creation of a several fishery, but in my opinion the people of a Tuath were "the public" against whom no appropriation was permitted, and the right of fishing in tidal navigable waters enjoyed by the people of a Tuath to the exclusion of the rest of the inhabitants of Ireland would be analogous to a public right of fishing, and not to the legal conception of a several fishery.

The plaintiffs have also founded an argument upon the right of fishing which is proved to have been enjoyed by several religious houses, and in particular in these very waters of the Erne by the monks of St. Bernard, who occupied the Abbey of Assaroe, which was granted to them in or about 1184 by Flaherty O'Muldory, Lord of Kinel Connel, for the good of his soul. The fishing rights of the Abbey of Assaroe are defined in an Inquisition taken on the spot on the 26th of November, 1588, pursuant to the Acts for dissolution of the Monasteries, and are found to be as follows:—"The Abbot and Convent of the Abbey aforesaid had in right of their Abbey or House aforesaid liberty for two fishermen to fish for salmon in the place of the river or stream called the Erne which is termed Asseroe near Bealashenan [Ballyshannon] every year during times in which salmon are caught And the second cast or draught [in English the second draught] of all the fishermen at Asseroe when they begin to fish And liberty for one skiff for fishing for salmon or other fish from the island up to the sea below, which fishing is of the yearly value

of three shillings and fourpence sterling English money aforesaid, which premises are the temporal (possessions) of the aforesaid Abbey." This is no "several fishery"but a limited liberty of fishing in the tidal waters of the Erne, granted to the members of a religious community, but the use which the plaintiffs seek to make of it is that they contend that the grantor—who is unnamed—of this liberty must himself have been the owner of an entire and exclusive right of fishing out of which this liberty was carved, and accordingly that the grant of this liberty is evidence of the existence in 1184, when Flaherty O'Muldory endowed the Abbey, or at some date between that and 1189, of a several fishery owned by him or by some unknown person who made the grant of the liberty to the monks of Assaroe. This argument depends upon a number of pure assumptions, and in my opinion the explanation suggested by Professor MacNeill is less improbable, while it is more consistent with the Brehon law concerning fishing rights. It is quite likely that when the Bernardine monks came into Tirhugh at the invitation of Flaherty O'Muldory from their mother Abbey at Boyle, they came as foreigners to the Tuath, and were permitted a limited liberty of fishing in the waters of the Tuath as an appurtenance to their monastery by the Chief and people of the Tuath. This view is confirmed by one of the pre-Norman grants to a religious house which has been given in evidence, viz. the Charter from Dermot, King of the Leinstermen, to the Abbey at Ferns, which is stated to have been made"by the counsel and assent of my princes and magnates,"and the Charter of Maurice MacLochlain, King of All Ireland, to the Cistercian Abbey of Newry is made "with the unanimous will and general consent of the nobles of Ultonia and Ergallia and Oneach." Grants in such form savour far more of a popular legislative act than of a feoffment or assignment of lands or of an incorporeal hereditament by a proprietor in his own right. When we come to grants such as those by John de Courcy in 1179 to the Monastery of Neddrum, of King John in 1179 to the Abbey of Jerpoint and in 1203 to the Abbey of Mellifont, and of Hervey de Monte Morisco in 1175 to the Abbey of Dunbrody, there is nothing surprising in the conveyance by a conqueror, or by the grantee of a conqueror, of property acquired by conquest, to the Religious whom he

found in actual occupation of a monastery upon the conquered territory, nor in the circumstance that his grant is made in the form in use in England at the time. Indeed, it is recited in the memorandum on the grant of John de Courcy to the Monastery of Neddrum that he had "subjugated Ultonia" in the twenty-third year of King Henry, *i.e.* 1177-8. He had in fact "gained the maritime coasts thereof from the Boyne to the Banne, and thereupon was made Earl of Ulster." (1). I find myself coerced by the evidence to the conclusion that the conjectures of Lord Chancellor Brady (2) that it was"highly probable that rights of this kind" (several fisheries in tidal navigable waters) "may have been enjoyed by the native princes," and of Willes J. (3) that"there is no improbability in the early appropriation of this always valuable property, or even a more extensive fishery, . . . in the time of the Irish Princes" cannot be successfully maintained in the light of our greater knowledge of the Brehon law, and that the plaintiffs must assert a right to a several fishery in the tidal navigable waters of the River Erne which had no existence as such until at earliest the later years of the reign of Queen Elizabeth.

Before I come to consider the documentary title of the plaintiffs, which commences with the Inquisition taken at Rathmullan on the 5th of September, 1603, I wish to guard myself against any suggestion that I have decided, or expressed any opinion upon, a question which seems to me to lie at the root of the plaintiffs' title, but upon which no evidence has been offered, and to which no argument has been addressed. It may be that there is nothing in it, and, if so, I have erred *ex abundante cautela*, and I can only plead in extenuation the reference to the same question by the Chief Justice in *R. (Moore) v. O'Hanrahan*(4).

There used to be a general belief, which originated I suppose in some loose observations by Lord Coke in the Institutes (5) and in *Calvin's Case*(6), and which has been fostered by elementary and inaccurate history books, that Ireland was conquered once for all in the reign of King Henry II, and that the laws and usages of England were in force throughout the length and breadth of the land from the time of King John, or, at the latest, from the date of what is called Poynings' Act, "whereby all the statutes made in England before that time were enacted established and made of force in Ireland. Neither did he only respect the time past, but provided also for the time to come, for he caused another law to be made, that no Act should be propounded in any parliament of Ireland,

but such as should be first transmitted into England, and approved by the King and Council there as good and expedient for that land, and so returned back again under the great seal of England" (1). "These laws, and others as important as these, for the making a commonwealth in Ireland were made in the government of Sir Edward Poynings. *But these laws did not spread their virtue beyond the English Pale* though they were made generally for the whole kingdom. For the Provinces without the Pale, which during the war of York and Lancaster had wholly cast off the English Government, were not apt to receive this seed of reformation because they were not first broken and mastered again with the sword. *Besides, the Irish countries, which*

contained two third parts of the kingdom, were not reduced to shire ground, so that in them the laws of England could not possibly be put in execution. Therefore these good laws and provisions, made by Sir Edward Poynings, were like good lessons for a lute that is broken and out of tune; of which little use can be made, till the lute be made fit to be played on" [(2)].

This passage, from Sir John Davies.' "Discovery of the true causes why Ireland was never entirely subdued and brought under obedience to the Crown of England, until the beginning of his Majesty's happy reign," is only an abridgement of portion of the judgment of the Court of King's Bench in *The Case of Tanistry*[(3)], where the statutes and the records of the Court are considered at length, which is introduced by the following passage:—"But as to the introduction of the common law of England into this Kingdom of Ireland, it is to be observed that as this island was not fully conquered and reduced to subjection of the Crown of England, all at one time, but by parcels, and in several ages; so the common law of England was not communicated to all the inhabitants, *simul et semel*, but from time to time, and to special persons and families of the Irishry, to whom the King was pleased to grant the benefit and protection of his laws." And the same judgment goes on to refer to the pleadings and records in the well-known cases in which issues were tried whether the respective plaintiffs were "mere *Hibernici, et non de quinque sanguinibus qui per concessionem progenitorum Domini Regis libertatibus Anglicis gaudere debent et utuntur*," or, in another case, "*non de sanguine aut progenie eorum, qui gaudeant lege Anglicana, quoad brevia portanda*." Even in the statutes down to the 33rd Henry VIII the English

disturbers of the peace are styled "rebels," but the Irish are called "enemies." It was a good plea to an action by an Irishman that the plaintiff was not an Englishman, nor one of the "five bloods" who enjoyed the privilege of being allowed to maintain suits in the Courts, and it was a good plea to an indictment for murder that the slain man "*fuit Hibernicus et non de libero sanguine*."There are extant numerous patents of denization, granted to "*Hibernici*," "*quod ipse de caetero in Hibernia utatur legibus Anglicanis, et prohibemus ne quisquam contra hanc concessionem nostram dictum C_____ F_____ D_____ in aliquo perturbet*," and even "*omni modo terras, tenementa, redditus, et servitia perquirere possit sibi et haeredibus suis in perpetuum*,"etc. Even the head of one of the five bloods,"O'Neale himself, in 20 Edward the Fourth, upon his marriage with a daughter of the house of Kildare (to satisfy the friends of the lady), was made a denizen by a special Act of Parliament, 20 Edward the Fourth, c. 8" [(1)]."Now we know as a matter of general history," says the Chief Justice in *R. (Moore) v. O'Hanrahan*, [(2)], "that Tirconnaill at this time" (*i.e.*, Henry II and John)"escaped invasion, and that the chiefs of Cinel Connel did not render feudal homage to Henry, and did not accept him as their overlord." The evidence of the historians in the present case carries our knowledge to a later date. Professor Binchy at Question 1648 and following questions:—"From 1171 down to the year 1541 is there any evidence of any submission by a chieftain of Tirconnaill to the Kings of England?" "No. None whatever." "I take it that from any time down to 1541 there is no

evidence of any submissions or claims to sovereignty by the Kings of England over Tirconnaill?" "Not that I have ever seen.""No acknowledgment of a right of sovereignty?" "No, no acknowledgment." "From the time that the O'Donnells succeeded to the Chieftaincy of Tirconnaill did they continue as Irish Chiefs up to 1541?" "Yes, *and probably later*.""Certainly up to 1541 for the moment?" "Yes." "For example was there a general submission of the Irish Chiefs to Richard II in 1392?" "Yes." "And in that submission was the Chief of Tirconnaill a notable absentee?""He was the great absentee, the most notable absentee.""Were there any settlements of foreigners made in Tirconnaill?""No permanent ones of any kind." "Was there any evidence of any attempts to introduce into Tirconnaill English rule or English law?" "Not until the very late sixteenth century." "In 1541 Manus
O'Donnell made his submission?" "He did." "*Was that submission followed by any attempt to set up English administration*?" "No, *it was not*." To this testimony I venture to add that of Sir John Davies, Attorney-General in Ireland from 1603 to 1616, who accompanied the Lord Deputy on his visit to the Counties of Monaghan, Cavan, and Fermanagh in 1607 after the death in rebellion of Hugh M'Guyre, and was one of the Commissioners for disposing of the forfeited or conquered lands in Ulster. It was on this visit that the Lord Deputy went to Ballyshannon itself. Of the submissions in 18 Ric. II to which reference was made in the evidence of Professor Binchy Sir John Davies says [(1)]:—"Yet did he not increase his revenue thereby one sterling pound, nor enlarge the English borders the breadth of one acre of land; neither did he extend the jurisdiction of his courts of justice one foot further than the English colonies, wherein it was used and exercised before." "After Sir Henry Sidney, Sir John Perrot, who held the last parliament in this kingdom, did advance the reformation in three principal points: First, in establishing the great composition of Connaught, in which service the wisdom and industry of Sir Richard Bingham did concur with him, next, in reducing the unreformed parts of Ulster into seven shires, namely, Ardmagh, Monahan, Tirone, Coleraine, Donegall, Fermanagh, and Cavan; *though in his time the law was never executed in these new counties by any sheriffs or justices of assize, but the people left to be ruled still by their own barbarous lords and laws*" [(2)]. "Sir George Cary (who was a prudent Governor, and a just, and made a fair entry into the right way of reforming this kingdom) did, in the first year of his Majesty's reign, make the first sheriffs that ever were made in Tyrone and Tirconnel; and, shortly after, sent Sir Edmund Pelham Chief Baron *and myself* thither, the first justices of assize that ever sat in those countries; and in that circuit we visited all the shires of that province" [(3)].

It is abundantly clear from these passages that Sir John Davies, who had first hand knowledge of the subject, did*not* consider that the English laws had been extended to Donegal in the reign of Henry VIII. From these extracts, and from a mass of other evidence, it seems to be an ascertained historical fact that the land and inhabitants of Tirconnaill never came into subjection to the Crown of England until the last year of Queen Elizabeth or the first

year of King James I, and were then acquired by conquest.

But that conquest did not of itself extend to the conquered territory and its inhabitants the laws of England. In *Campbell v. Hall*[1] the manner in which the laws of England are imparted to Dominions, Colonies, and ceded or conquered territory, was the subject of adjudication in the Court of King's Bench, and the case of Ireland came under particular consideration. Lord Mansfield ([2] expressed the clear opinion of the Court that it was the prerogative of the King to promulgate new laws, without the concurrence of Parliament, for a *conquered* country."This is not a matter of disputed right; it has hitherto been uncontroverted that the King may change part or all of the political form of government over a conquered dominion. To go into the history of conquests made by the Crown of England. The alteration of the laws of Ireland has been much discussed by the lawyers and writers of great fame." (The "Discovery" of Sir John Davies, to which I have referred, was largely cited, especially by the celebrated Mr. Francis Hargrave, in the three arguments which took place.) "No man ever said the change was made by the parliament; no man, unless perhaps Mr. Molyneux, ever said the King could not do it." In *Fabrigas v. Mostyn*[3], de Grey C.J., with whom Gould, Blackstone, and Nares JJ. agreed, declared that it was the right of the King in Council to make regulations for the government of the conquered island of Minorca, and in *Jephson v. Riera*[4] the Privy Council, on appeal from the Supreme Court of Gibraltar, held, following*Campbell v. Hall*[1], that the power of making laws for the conquered territory was "vested in the Crown, without any limitation as to the advice under which it may be exercised."

It appears to me to follow from these authorities that the date upon which the provisions of Magna Charta, or of any other English law, became applicable to the newly conquered territory of Tirconnaill depends upon, and must be ascertained from the proclamation or Order in Council, if any, by which the laws of England were extended to the new subjects of the King, and if no such proclamation was made, then from whatever statute, either of the English or the Irish Parliament, made the existing laws of England or Ireland of force in that territory. It further appears to me that in the interval between the conquest

and the promulgation of English law, the King, for whom the territory had been conquered by his army, could exercise the royal prerogative of making grants of the conquered land, and of creating several fisheries in the tidal navigable waters around its coasts, unfettered by the limitations imposed upon him in respect of his English Dominions, or of the Irish Pale, by Magna Charta.

If I am right in the opinion that the laws of England had not been extended to Tirconnaill when the first grant of a several fishery in the tidal waters of the Erne at Ballyshannon was made to a subject of Queen Elizabeth or of King James, the granteee would have just as good a title to it as William de Braosa had to the fishery which was the subject matter of the decision in *Malcomson v.O'Dea*[1]. The *Case of Tanistry*[2] also supports the view that English law was not in force in Tirconnaill until about the year 1607 or later. We have not been referred to any

proclamation, and I do not know whether any proclamation was made, before the first grant of a several fishery in the tidal navigable waters of the River Erne on October 14th, 1603, but there was a statute passed in the Parliament of Ireland, held in the eleventh, twelfth, and thirteenth years of King James I, cap. 5, entitled "An Act of Repeale of diverse Statutes concerning the Natives of this Kingdom of Ireland," by which, after a recital "that all the natives and inhabitants of this kingdome, without difference and distinction, are taken into his Majestie's gratious protection, and doe *now* live under one law as dutiful subjects of our Sovereigne Lord and Monarch,"a number of statutes against the Irish and their customs were repealed. That Act is dated 1612, the year in which the session had commenced. Of the earlier chapters, the first, also 1612, is "a most joyful and just Recognition of his Majestie's lawfull, undoubted and absolute Right and Title to the Crown of Ireland," and after reciting that until the suppression of the late rebellion, presumably that of the Earls of Tyrone and Tyrconnell in 1607, "the unreformed parts of this land, which being ruled onely by Irish lords and customs, *had, never before received the lawes and civill government of England*," refers to the securing the lands and estates of his Majestie's subjects by the strengthening of defective titles and regranting of estates, and finally to the reduction "to your Majestie's hands and possession" of "great scopes of land" in the Province of Ulster by the "defection and attainder" of "divers wicked and ungrateful traytors" in those parts, and "the

civill plantation of those escheated lands." Chapter 4 is the "Act for the Attainder of Hugh, late Earl of Tyrone; Rory late Earl of Tyrconnell; Sir Cahir O'Dogherty, knight, and others," and by it all their lands are forfeited to his Majesty, with a proviso saving "any graunt, gift, lease, or demise," made by his Majesty "to any person or persons by letters patents under the great seal of Ireland or under the great seal of England." The fishery which is in dispute in the present case had been leased nine years before the date of this statute by King James to one, Binglie or Bingley, and had been for several years in the actual possession of Sir Henry ffolliott, from whom the plaintiffs derive their title.

I mention, lest it should be supposed that I have overlooked them amongst the mass of documents in this case, three instruments which record dealings between the Crown and Irish Chieftains of Tirconnaill. The first is a "Treaty between the Lord Deputy and Calvart O'Donnell by which O'Donnell surrenders to the Queen all regal services and rights in Connalia." It bears date 8 Elizabeth, that is 1565, and is attested by three of the O'Donnell family, by Donald Magonnell, Bishop of Raphoe, O'Doghertie, Chief of his name, three of the McSwines, of whom one was the Chief of his name, "and other gentlemen of Connalia."Calvart O'Donnell agrees, *inter alia,* that "Her Majesty shall have the donation of all bishops and other ecclesiastical persons in Connalia." We know from Sir John Davies that the Queen never succeeded in putting this power into execution in Tirconnaill, and this "Treaty" is not, as is manifest from its provisions, an unconditional surrender by the King or Chief of a conquered country, and, in any event, it is difficult to see how Calvart O'Donnell, whose title was subject to the Brehon law,

could make a valid surrender of the lands of his Tuath. Several of the attesting witnesses were subsequently attainted, and Donald Magonnell, Bishop of Raphoe, is that Donaldus Magoniall, Hibernus, Episc. Rapotensis, whose name is recorded amongst the Episcopi Pii IV, in the concluding Sessions of the Council of Trent. The next document is a Grant of March 18th, 43rd Elizabeth (? 1601), to Neal Garve, or Garrowe, O'Donnell, Chief of his name, of *the custody of* the country or territory of Tirreconnell, "with all lordships, manors, lands, customs, rents and services which had been granted to Calvart O'Donnell, grandfather of Neal, *excepting* the castle and town of Ballishannon, 800 acres of land adjacent, *the fishings of the Earne* and all rights and royalties in Connalia and the donations of the bishoprics, presentation of churches and all lands and possessions as well spiritual as temporal to hold during pleasure"; and the third is a grant on 10th February, 1603, to Rorie O'Donnell, Earl of Tirreconnell, and his heirs male, remainder to his brother Caffrey and his heirs male of all the territories and countries within the circuit of the land called Tireconell, &c., to hold in as full and ample manner as his brother, Hugh Rufus O'Donell, who was attainted and died in Spain, or as his father, Hugh Manus O'Donell, or his grandfather, Manus O'Donell, or any other of his ancestors. This reserves, *inter alia*, "fishings," "the castle or fortress town and circuit of Ballishannon" with the precinct thereof with all lands &c belonging to the said castle, 1000 acres, "and also the entire fishings belonging to the said castle in all the rivers &c within the said town and 1000 acres."

With respect to the Elizabethan grants to the O'Donnells, there is a significant resolution of the Court in the *Case of Tanistry*[(1)]. "A tanist surrenders to the Queen, who regrants the land to him, the Queen's grant is void.""It was also resolved that nothing passed by the grant of Queen Elizabeth made to Conoghor O'Callaghan, as it is found by the verdict; for the grant is made in consideration of his surrender, and he claimed nothing but as tanist, who hath no estate of which the common law taketh notice . . . by which the grant of the Queen made in consideration of such estate surrendered is void in law,*Barwick's Case* 5 Co. 93, and the case of *Altonwoods*, 1 Co. 43, 18 Eliz. Dyer 252." "Lastly where it was objected by one of the counsel for the plaintiff that Queen Elizabeth should be said to be in possession of this land" (which was in "Publicallaghan, otherwise O'Callaghan's countrie,"in the County of Cork, a long settled part of Ireland) "by virtue of the first conquest of Ireland . . . it was resolved against this objection that Queen Elizabeth shall not be said to be in actual possession of this land by virtue of the first conquest, if it doth not appear by some record that the first conqueror had seised the land at the time of the conquest, and appropriated it particularly to himself as parcel of his proper demesne." The Court then proceeds to state the law as to conquered lands substantially as it was stated by Lord Mansfield in *Campbell v. Hall*[(2)] a hundred and sixty-five years later.

That was a Cork case, but when we turn to Tirconaill, Sir John Davies points out that, instead of seising the lands,"no Governor during Queen Elizabeth's reign did refuse

to grant any of those 'Captainships'" (the kind that were granted to the O'Donnells as above mentioned) "to any pretended Irish lord who would desire, and with his thankfulness deserve the same. And again, though the greatest part of Ulster were vested by Act of Parliament in the actual and real possession of the crown; *yet was there never any seisure made thereof, nor any part thereof brought into charge, but the Irish were permitted to take all the profits without rendering any duty or acknowledgement for the same*."

I have dealt with this matter, which was not discussed during the argument, at, I fear, inordinate length, but I am anxious to protect myself against any suggestion that I have decided, or that it is involved in my decision, that Magna Charta was in force in Tirconaill before 1612, or that King James I or Queen Elizabeth could not have had any power to create a new several fishery in tidal navigable waters in Tirconaill after that territory had been acquired by conquest, and before a proclamation, Order in Council, or statute had been made extending the laws of England, including Magna Charta, to it and its inhabitants, or that the principles declared in *Attorney-General for British Columbia v. Attorney-General for Canada*, [(1)], as applicable to newly settled colonies, have any application to dominions newly acquired by conquest, as was the case with Tirconaill at the beginning of the seventeenth century.

Dealing with the case upon the assumption, which has not been disputed by the plaintiffs' counsel, that Magna Charta was in force in Tirconaill before the reign of Queen Elizabeth, and upon the conclusion at which I have arrived upon the evidence, that no several fishery existed in fact before 1189, I must consider the plaintiffs' alternative case, which is founded upon certain statutes passed in the reign of Charles I for the confirmation of Letters Patent and for the remedying of defective titles, and which was introduced by an amendment of the pleadings during the hearing of the case in the Court of first instance.

The plaintiffs' title is as follows:—On the 5th of September, 1603, by an Inquisition taken at Rathmullan in the County of Donegal, it was found that this fishery, with others, belonged to the King (James I) in right of his Crown. I am not satisfied that this finding was induced by any misunderstanding of the law relating to fisheries in tidal navigable waters on the part of Sir John Davies or anyone else. I think, though I do not decide, that this Inquisition, and the later one taken at Lifford on September 12th, 1609, may well have been taken to ascertain the properties acquired

for the Crown by conquest from the Chieftains of Kinel-Connel and Kinel-Owen, and included in "the great scopes of land" in the province of Ulster, which the statute of James I declares to have been reduced into his Majesty's hands and possession and "had never before received the lawes and civill government of England." On October 14th, 1603, this fishery was demised to one, John Binglie or Bingley, for a term of 21 years at a rent. What became of Bingley and his lease does not appear, but within three years, viz. on June 7th, 1606, a new lease for 21 years of the self-same fisheries was made by the Crown to Sir Henry ffolliott. This lease comprised the

fishing rights of the dissolved Monastery of Assaroe, and all the other rights of fishing in the Ballyshannon waters. For some undiscoverable reason, a second lease of the identical fishing rights was made on July 6th, 1607, to Sir Henry ffolliott for the term of 20 years, that is the unexpired residue of the term created by the previous letting. On April 12th, 1608, a grant in fee of the Abbey fishings was made to one, Francis Gofton, at the annual rent of eight pounds ten shillings, and this grant included the reversion expectant upon any demise"before this time made," presumably the reversion expectant upon the lease to ffolliott. At an Inquisition taken at Lifford on the 12th of September, 1609, it was found that the Assaroe Abbey fishings were then in the possession of Sir Henry ffolliott, and "that the whole countrie of Tireconnell, otherwise called O'Donnell's countrie, and all lands, tenementes, fishinges, royalties and hereditamentes within the said com. of Donegall, (except the said countrie and lands of Inishowen and excepte all castles, lands, tenements and hereditamentes abovementioned to belonge to any bishoppricke, deanerie, abbie, monasterie, or religious house) are now in the reall and actuall possession of the Crowne by *reason of the attainder of treason of Rorie late Earle of Tireconnell*." On July 20th, 1609, a grant of enormous tracts of lands in half a dozen counties, including the fishery in the estuary of Erne at Ballyshannon, was made to the Baroness of Delvin and her son Nugent. This, was subject to the berm of the lease to Sir Henry ffolliott. These Inquisitions, and the grants, the interests under which were subsequently acquired by ffolliott, were all prior to the statutes of 11 Jac. I., which extended the English law to all the inhabitants of Ireland, but which contained an express saving of all grants etc. previously made.

On March 21st, 1620, a second Inquisition was taken at Lifford, at which there was a presentment of a royal fishery for salmon in the sea below Ballyshannon, which was found to have been in the possession of ffolliott and his assigns*for sixteen years past*, which takes us back to the conquest of Tirconaill.

ffolliott appears to have been very assiduous in collecting to himself all the outstanding and conflicting interests in the properties comprised in these different grants and leases, for by an Inquisition taken at Ballyshannon on the 2nd of January, 1620, it appears that he had acquired by purchase from Gofton on May 20th, 1608, the premises comprised in the grant to Gofton of April 12th in the same year, that on July 10th, 1604, he had purchased from one, Robert Leycester, lands and fishings in Fermanagh and Sligo which had been granted by the Crown to Leycester on May 17th, 1604, and finally, that he had purchased from the Baroness Delvin and her son the Ballyshannon fisheries comprised in the grant to them of July 20th, 1609, together with other liberties appertaining to the counties of Donegal, Sligo and Fermanagh. He had also obtained from the King in 1612 a grant of the castle and town of Ballyshannon with about 1,000 acres of lands appertaining thereto. Upon the 9th of April, 1622, by Grant pursuant to Letters Patent dated October 22nd, 1618, King James granted to Sir Henry ffolliott, who was then Baron of Ballyshannon, the entire premises comprised in the different grants and leases to

which I have referred, including, with many others, the Abbey of Assaroe, its lands, weirs, and liberties of fishing, the castle, bawn and fort of Ballyshannon, the 1,000 acres, the fairs and tolls, "and also the entire creek bay or river of Bealashanney, otherwise Ballyshannon, viz.: from the high sea as far as the Bank or Fall of water commonly called the salmon leap, otherwise the fall of Asheroe, near the castle of Ballyshannon and also the aforesaid Bank or Saltus Salmoni, in English the Salmon Leap, otherwise the fall of Asheroe, with its appurtenances and also the lakes, weirs, islands and banks in or near the aforesaid creek, bay and river aforesaid and the soil and ground and water of the aforesaid creek, bay, lake or river and all land covered with water there and also the entire fishing and liberty of fishing to take salmon and all other kinds of fish whatever in or within the aforesaid creek, bay and river aforesaid and upon the banks aforesaid . . . and also the whole and entire river and water of Erne aforesaid from the high sea as far as Lough Earne and the ground and soil of the same with the appurtenances, lying and being in the Counties of Donegal and Fermanagh or either of them, which all and singular the premises above by these presents before granted now are in the tenure and occupation of the aforesaid Henry Lord ffolliott, Baron of Ballyshannon, his tenants or assigns." The *habendum* of the granted hereditaments is in fee simple as regards the Abbey premises, *in capite* by military service as regards the castle of Ballyshannon and the lands appertaining to it, and as to other lands, etc., in fee and common soccage. This grant contains provisions for the maintenance of the castle of Ballyshannon, and for the placing therein of a constable and wardens during the minority of any heir of Lord ffolliott, and especially full warranties and *non obstante* clauses.

Henry Lord ffolliott died shortly after this grant, and an Inquisition *post mortem* was held at Ballyshannon on March 1st, 1623, by which it was found that he died seised in fee of all the premises granted by the Patent of April 9th, 1622, subject to some grants which are not material to the title to the fishery, and to provisions for his widow, two sons and a cousin, and that "Thomas the present Lord ffolliott his son and next heir was then aged 9 years and 8 months and not married."

The next document, which is treated either as a continuation of the title of Henry Lord ffolliott, or in the alternative as a fresh root of the plaintiffs' title, is a Grant by Letters Patent under the great seal, dated the 30th of August in the fifteenth year of Charles I, and duly enrolled, whereby there were granted to the said Thomas Lord ffolliott, the eldest son of Henry, together with other hereditaments, all the lately dissolved Abbey of the monks of St. Bernard of Asheroe, with the fishings and liberty of fishing in or near the bay or port of Ballyshannon between the castle of Ballyshannon and the high sea, "which were reputed and are now reputed to belong to the said Abbey or the Abbot and Convent thereof from a time of which there is no human memory to the contrary," the castle of Ballyshannon with its appurtenant and adjoining lands, its markets and fairs, "and also all the creek, bay or river of Beallashenny otherwise Ballyshannon viz.:—from the high sea to the rock, in English 'the rocks or waterfall' commonly

called 'the Salmon Leaps otherwise the fall of Asheroe' near the castle of Ballyshanny aforesaid And also all the aforesaid rock or salmon leap or fall of Asheroe with the appurtenances And also all and singular loughs weirs islands rocks . . . and waterfall in within or near the aforesaid Bay creek and river of Ballyshanny otherwise Ballyshannon aforesaid And all the bottom soil land and water of the aforesaid creek bay or river and all land covered and to be covered with water there and also the whole fishing and liberty of fishing and to fish for and catch salmon and all other kinds of fish whatsoever in or within the aforesaid creek bay and river aforesaid and on the rocks aforesaid . . ." Then follow eel weirs and "the liberty of having nets and other instruments necessary for fishing on the rocks, creeks, river and bay aforesaid and also the liberty of carrying off all fish and catch of fish of every. kind from the aforesaid rocks . . . creeks river or bays or from any part thereof," *Habendum*, as regards the fisheries and fishings, to Thomas Lord ffolliott his heirs and assigns for ever. All the premises are created into one entire manor to be for ever reputed styled and named the Manor of Bealashanny in the County of Donegal.

These Letters Patent are stated to be "according to the intention and effect of our Commission under our Great Seal of England bearing date at Canbury [Canterbury] in our said Kingdom of England on the first day of September in the fourteenth year of our reign, as well for and in consideration of a certain fine or sum of ninety-nine pounds seven shillings and sixpence," and they contain in further pursuance of the said Commission a release to Thomas Lord ffolliott from "all and singular the conditions covenants articles mandates instructions and agreements of the plantation, and all and singular other the conditions covenants agreements and mandates whatsoever and howsoever contained mentioned or specified in any prior Letters Patent of the premises before mentioned or any of them or any parcel thereof made or mentioned to be made to the aforesaid Thomas Lord ffolliott or any other person or persons whomsoever before the date of these our Letters Patent," a release remittance and quit claim of all penalties, rights of re-entry for breach of any condition in any prior Letters Patent, or by reason of any violation or non-performance of any condition article mandate instruction provision or limitation for the plantation, with only a proviso for the maintenance and repair by Thomas Lord ffolliott, his heirs and assigns, of the castle and fortalice of Ballyshannon, and the reservation of a right to instal a constable and ten wardens in the Castle during the minority of any heir. The grant is to be free of all rents, penalties, articles of plantation, covenants for performance of the plantation, forfeitures for nonperformance of the plantation, and, after an elaborate *non obstante*clause, specifying many statutes, "notwithstanding any other statutes Acts ordinances prohibitions restrictions instructions or provisions or any other thing cause or matter in evacuation and weakening or annulment of these our Letters Patent."

Of themselves, these Letters Patent would have no more, and no less, force or validity than any other royal grant, but they were made in pursuance of, and were invested with the validity conferred by, a statute passed in the fifteenth year of Charles I [(1)], by which it was enacted, after

reciting the creation of divers Commissions of Grace for the remedy of defective titles in Ireland, and the granting of lands and hereditaments upon them "as well . . . as . . . upon the latter commission of grace bearing date at Canterbury in the realme of England the first day of September in the fourteenth year of his said Majestie's reign," and that some lands had not yet passed but might thereafter be passed, it was enacted that all letters patent"which are already past . . . under the greate seale . . . of Ireland" "by vertue or pretence of or reference unto any commission of grace now in being or hereafter to be within this kingdom or any other former commission or commissions granted since the beginning of his now Majestie's reign to any person or persons . . . shall be by authority of this present Parliament enacted and to be and shall be deemed and adjudged to be good sufficient effectuall and indefeazable to all intents constructions and purposes in manner following (that is to say) for and concerning all . . . lands . . . lying or being within every or any of the late plantations within this kingdom made by our late soveraign lady Queen Elizabeth, our late most gracious lord King James, and made or to be made by the King's most excellent Majesty that now is, or by any of them, as well against his Majesty his heirs and successors, as against all and every other person and persons, bodies politick and corporate, as well spiritual as temporal whatsoever . . . notwithstanding . . . any statute ordinance law cause matter or thing which might or may any way impeach enfeeble avoid or destroy any of the said letters patent in all or any point or points whatsoever." There follows an enactment for quiet enjoyment. The second section enacts that His Majesty shall be deemed seised of an absolute estate in right of his imperial crown in all lands and hereditaments in the counties of Tyrone, Armagh, Donegal, Fermanagh, Cavan, Leitrim and Longford; in several countries, formerly of the Irish families, in other counties; in several reputed plantation lands in or near certain territories in Westmeath and Wexford; in several hereditaments in the counties of Waterford, Cork, Kerry,

Limerick and Tipperary, usually called or theretofore passed as plantation lands, "at every such time and times respectively, whensoever *any* of the same before mentioned . . . hereditaments shall be within the space of five years next ensuing the end of this present session of Parliament new passed granted confirmed released or assured . . . to any person or persons . . . by letters patents under the great seale of this kingdom by vertue or pretence of or reference unto any such commissions of grace now being or hereafter to be within this realme, being either former patentees, or reputed inheritors or proprietors, or by former assignation distribution or appointment have taken the profits thereof," the grantees shall from and after the passing or sealing of any such letters patent be confirmed in their possession and may hold "as well against his Majesty his heirs and successors as against all and every other person and persons bodies politick and incorporate"freed and discharged from everything except what shall be saved in the letters patent.

This Act, together with three previous Acts for confirming and strengthening defective titles, appears to me to have been passed with the express object of ensuring to the patentees of the Crown, with the authority of Parliament, the estates which had been granted to them, and it appears also that each statute was passed to remedy some oversight or to meet some objection which had been or which might be made to the validity of a title derived under the previous statutes or some grant which they had been intended to confirm. Thus under 10 Car. I, sess. I, cap. 3, titles had been confirmed only against the King his heirs and successors and all other parties to the same and persons claiming under them. 10 Car. I, sess. 3, cap. 2, was to meet the case of any failure to enrol or record letters patent, to provide for misrecitals and misnomers, and to acquit patentees of reservations in earlier grants of the same lands, while 10 Car. I, sess. 3, cap. 3, which is in almost identical terms with 15 Car. I, cap. 6, only provided for the validation of grants made within "five years next ensuing the end of this present session of Parliament," a period which expired on the 20th of March, 1639. The recitals in 10 Car. I, sess. 3, cap. 3, show the classes of grantees for whose benefit it was enacted. It recites that "sundry plantations have at severall times been made" in eighteen specified counties which include Donegal, "grounded as well upon ancient as recent title of your crown, declared as well by inquisitions as other records and evidences; upon all which divers patents have been passed, and thereby very many undertakers,*and others of Brittish birth*, and very many of the natives of best quality and condition have been there planted and settled . . . by occasion of all which, very many castles, bawnes, strong houses, forts and townes walled, have since been built and erected . . . to the unexpected enriching and civilizing of the said severall*counties* and territories." With a view to the confirmation of grants, his Majesty is to be deemed and adjudged seised and vested "in the actuall and reall possession and seizin""by good lawfull and indefeasable title and estate in fee simple," in right of his imperial crown of England and Ireland of "all castles, mannors, lands, tenements and hereditaments lying and being in the said severall counties of Tyrone, Armagh, Donegall, Fermanagh, Cavan, Londonderry, Leytrim and Longford," which is a complete enumeration of eight counties, with no reference to any distinction between "plantation lands" and any others, though in the following categories of lands elsewhere in Ireland, distinction is drawn between territories, precincts and countries of the Irish families, plantation lands, reputed plantation lands, and lands passed as such. The 15 Car. I, cap. 6, is almost identical, except that for some reason it omits Londonderry and the nomenclature of the Irish families is corrected, and the confirmation is made even more elaborate.

The grant to Thomas Lord ffolliott by letters patent dated August 30th in 15th Car. I recites that they were made in pursuance of the Commission of Canterbury dated September 1st, 14th Car. I, which was the foundation of the Statute of 15th Car. I, cap. 6, and the grant was duly enrolled within the prescribed period, and from that date down to the recent attempt by the special defendants to invade the possession of the plaintiffs, it is not suggested that the grantees under those letters patent have not been in continuous possession and uninterrupted

enjoyment of the fishery at Ballyshannon, and it is admitted that the fishery claimed by the plaintiffs is the same fishery which was granted by the letters patent. The Attorney-General has quite properly admitted that, if the grant by the letters patent of 15 Car. I be valid, no question arises upon the subsequent devolution of title to the present plaintiffs.

I understand that the validity of this grant is disputed upon two grounds:—First, that the lands comprised in it are not "plantation lands," and, second, that ffolliott was not an "undertaker" or a person entitled to share in what is called by the Attorney-General "the plantation." The answer to the first objection appears to me to be that the whole of the county of Donegal is declared by the Acts 10 Car. I, sess. 3, cap. 3, and 15 Car. I, cap. 6, to be deemed to have been vested absolutely and indefeasibly in his Majesty for the express purpose of validation of any grants made by him. The counties specified in the first category of lands dealt with by those statutes are those which were the last to be conquered and the same which comprised the territories forfeited to King James I by the 11 Jac. I, cap. 4, when the Earls of Tyrone and Tyrconnell, Sir Cahir O'Dogherty, the O'Reillys of Cavan, Maguire of Fermanagh, O'Hanlons of Armagh, and many more were attainted and outlawed, and their lands absolutely forfeited to His Majesty. These statutes appear to me by their very terms to put the Ulster counties named into the same position as plantation lands, and certainly to validate all grants of lands in those counties, whether strictly plantation lands or not, and the grants to the ffolliotts are in form plantation grants. It was not necessary to constitute a "plantation" that a whole county or even a considerable tract of land should be settled. The planting of "castles, bawnes, strong houses, forts and townes walled," in or on the border of a hostile country was a "plantation," and plantations of this description were effected by English Monarchs and their Deputies long before the great Stuart and Cromwellian schemes of settlement were dreamt of. I can imagine no site more suitable for the plantation of a "castle, bawne, strong house or fort," than the great passage of the Erne which has been called Seanach's Ford since the earliest times of which we have even a tradition. The castle, which was put in charge of ffolliott, commanded the ford over the Erne which was the gateway into or out of Tirconaill, which was the pass by which the peoples of Kinel-Connell were wont to start on their raids into Sligo and Connacht, and it was across the ford at Ballyshannon that the forces of O'Donnell passed upon that last disastrous journey which ended for so many of them at Kinsale. It was also the bridge-head for operation against Tirconaill, and corresponded to the great fort upon the Blackwater which was constructed and maintained as a curb upon the activities of Tyrone. All the provisions in the grants of the Ballyshannon estates seem to me to be peculiarly appropriate to the plantation of a Warden of the Ford to protect the neighbouring counties against the aggression of the still unconquered Kinel-Connell.

Upon the second point, Sir Henry ffolliott is termed by manifest implication a "servitor" in the King's letter dated October 22nd, 1618, a document which recites his interest in this very fishery, and the letter was the authority for the grant to him of April 9th, 1622, by which all the

property which he had gathered in from Bingley, Gofton, Leycester, and the Nugent family was created one entire manor of Ballyshannon and granted to him. In the grant to Thomas Lord ffolliott, his son, in 1639, there was actually a clause releasing him from the articles and conditions of the plantation, perhaps because there was no longer need to guard the passage of the Erne against the peoples of Tirconaill.

So far as these two points are concerned, I am in complete agreement with Johnston J. and I adopt what he has said on them.

If there were any doubt or ambiguity concerning the true interpretation of the Statutes 10 Car. I and 15 Car. I, in my opinion, the unchallenged enjoyment of the property for three hundred years ought to be attributed, if it can reasonably be referred, to a lawful origin, and that construction which will support such an origin should be placed upon any ambiguous language in the Statutes."I cannot go along with his Lordship [Lord Justice Clerk],"said Lord Brougham, in the *Magistrates of Dunbar v. the Duchess of Roxburghe*[(1)], "when for this reason he denies that usage, however long and inveterate, could be binding and operative on the parties. It can be binding and operative upon the parties only as it is the interpreter of a doubtful law, as affording a contemporary interpretation; but it is quite plain that, as against a plain statutory law, no usage is of any avail. But this undeniable proposition supposes the statute to speak a language plainly and indubitably differing from the purport of the usage. Where the statute, speaking on some points, is silent as to others, usage may well supply the defect, especially if it is not inconsistent with the statutory directions, where any are given; *or where the statute uses a language of doubtful import, the acting under it for a long course of years may well give an interpretation to that obscure meaning, and reduce that uncertainty to a fixed rule, optimus legis interpres consuetudo*, which is sometimes termed *contemporanea expositio*; and where you can carry back the usage for a century, and have no proof of a contrary usage before that time, you fairly reach the period of *contemporanea expositio*."

When I find that not for one century, but for three,

the lands comprised in the ffolliott grant have been dealt with as if they were plantation lands, and, so far from any contrary usage appearing, that there has been an uninterrupted and unchallenged enjoyment of the whole property upon this basis, and that the statutes of Charles refer to Donegal in terms which at least admit of the interpretation that the whole county was regarded as plantation land or reputed as such, I think that the principle of interpretation stated by Lord Brougham may be applied to these statutes, and that it is not even necessary to call in aid the express enactments, in the statutes themselves, that they are to receive the construction most favourable to the patentees.

That the language of the statutes is at least "of doubtful import," and that it does not differ "plainly and indubitably from the purport of the usage," is not an unfair deduction from the fact that judicial opinion is evenly divided upon its interpretation; and that usage *has* placed this construction upon the statutes seems to me to be established by the following proved or admitted facts:—The patentees and their tenants and assignees have been in actual possession and enjoyment, not alone by a documentary title, but by actual use, of the fishery in question without challenge by the Crown or by anyone else, for over three hundred years. During that period the grantees have paid and the Crown has accepted the rents reserved by the grants and payable in respect of the fishing rights and the several fishery granted to Henry Lord ffolliott and found by Inquisition to have been in his possession since 1603. That the Crown rent was redeemed so recently as 1897 by payment to the Crown through the Land Judges Court of a capital sum; that the existence of this several fishery was recognised as such in at least two public statutes, 31 Geo. II, cap. 13, and 3 Geo. III, cap. 35; that the fishery has been constantly dealt with as property, has been let and sold from time to time; that it has been taxed and rated, as a several fishery, to the relief of the poor for nearly a century; and finally, that the Special Commissioners of Fisheries, under the Acts 5 & 6 Vict. c. 106, and 26 & 27 Vict. c. 114, and the Inspectors of Irish Fisheries under the Fisheries (Ireland) Act, 1869, have given certificates from time to time as required by law that the "fixed engines" for catching salmon in the estuary or tide-way of the River Erne, owned and worked by the plaintiffs, their predecessors and the lessees of their predecessors, were legal—certificates which could not have been granted unless the owners or users of the engines in question had first satisfied the Commissioners that they had been legally erected "in a several fishery." It was the duty of the Commissioners, as a specially appointed statutory tribunal, to inquire into all these fixed engines in estuaries of rivers and to abate and destroy all illegal engines. Such fixed engines were illegal unless they had been erected by a person legally possessed of or entitled to a several fishery, and the title to the fishery was one of the matters which the Commissioners were empowered to investigate. If the Commissioners were "satisfied" of the legality of the engine, they were to give a certificate to that effect. A special appeal was provided by the statute for any person aggrieved, but the adjudication of the Commissioners was not removable by *certiorari*. It was held in the *Lax Weir Case*[(1)] that the decision of the Commissioners under 5 & 6 Vict. c. 106, as to the legality of a weir was a judgment *in rem*, and by Palles C.B. and Andrews J. in *Devonshire v. Drohan*[(2)] that the determination of the Commissioners under 26 & 27 Vict. c. 114, as to the legality of a weir, was a judgment *in rem* and conclusive against the world.

Each of these circumstances was a recognition of the existence of a several fishery in the tidal navigable waters of the River Erne as a legal entity which could have existed only if the original grant of the fishery had been made by James I in exercise of his royal prerogative as a conqueror before Magna Charta had been promulgated in Donegal; or if the statutes for confirming defective titles had been generally recognised and construed as applicable to the

ffolliott grants; and I hold that I am not only empowered, but bound, to adopt that interpretation of the language of the statutes of 10 and 15 Car. I which will uphold the possession and dealings of three hundred years as legal, provided always that the language of the statutes is reasonably capable of such an interpretation.

It may be observed that the fishery was not the only, or even the principal, hereditament comprised in the grants with which we are concerned. It was only severed from the ffolliott estate in 1869, when the great possessions of the Right Hon. Thomas Connolly were sold in the Landed Estates Court. His father the Right Hon. William Conolly had purchased the ffolliott estates in 1719, but, if the ffolliott grants are invalid as being outside the purview of the Caroline statutes for the strengthening of defective titles, it is not the title to the fishery alone that has been undermined by this decree, but that to all the property comprised in the grant to Thomas, Lord ffolliott. The fact that the Right Hon. William Conolly paid the representatives

of Lord ffolliott £48,000 for their property in 1719, and that the predecessors of the present plaintiffs purchased this fishery in the Landed Estates Court for the sum of over £45,000 in 1869, and took a conveyance from the Court, cannot affect the rights of the parties, inasmuch as this Court has already decided that the Landed Estates Court conveyance passed only whatever rights the purchasers might be able to prove had been possessed by Thomas Conolly, and that the consideration for their £45,000 was nothing more than a barren rock in the Erne, and a right to whatever they might be able to establish their title to by litigation. That decision binds me, and I accept it *ex animo*, but I do not read the speeches of the Lords in *Mecredy and Others v. Alexander and Others*[(1)]as deciding what was not before their Lordships' House, or in question in that action, viz. the title of the purchasers under the Landed Estates Court conveyance to a several fishery in the tidal waters of the River Erne at Ballyshannon, which at the date of that decision had been actually possessed and worked by their vendor and his predecessors for two and a half centuries; and I feel considerable doubt whether, if it had been proved to their Lordships, as it has been in this case, that Conolly and his predecessors in title, and his successors, the plaintiffs in *Mecredy and Others v. Alexander and Others*[(1)], had been in actual uninterrupted and exclusive enjoyment of the disputed fishery for three hundred years, and the Marquis of Ely had been an intruder of yesterday, they would have come to the conclusion at which they did in fact arrive. On the other hand, it seems to me that each of the Lords, with perhaps the exception of Lord Bramwell, did express an opinion, *obiter* though it was, that the Landed Estates Court conveyance was effective to pass"an existing subject which was in lease to tenants named Shiel"; "the existing and known Ballyshannon salmon and eel fisheries which were separated from the riparian rights by means of the enjoyment of the lessees, and had therefore in that way a real existence at the time when the deed was made"; "a distinct subject of conveyance . . . that Ballyshannon salmon and eel fishery of Thomas Conolly as to which the leases and tenancies are reserved at the end, and which appears by this schedule to have been a known and existing thing, but which did not include in point of fact

Lord Ely's waters": *per* Selborne L.C. Lord Blackburn says:—"On the very face of the instrument by the reference. which the Lord Chancellor has pointed out, to the two leases which are given, it shows
that there were *de facto* existing fisheries of the sort which I have mentioned, both in the tidal and in the non-tidal part. It is expressly mentioned in the first lease that there is a salmon fishery in Ballyshannon 'through the whole extent of the River Erne and the waters thereof and the river commonly called or known by the name of the Abbey River and the waters thereof and all other rivers and watercourses having communication with the said Rivers Erne and Abbey where salmon is known to breed and cast spawn.' That plainly is a grant enjoyed by Shiel of a salmon fishery in the tidal part and in the non-tidal part; and embraced within it there is what is called for shortness the salmon fishery of Ballyshannon." He then proceeds with a passage which I will not quote, but of which every word is important, and concludes: "I say, what does that mean when we know as a matter of fact that there was a separate and several fishery *de facto* severed from the right to the river and everything else and *de facto*enjoyed. It seems to me that, when once you have got that fact brought before you, these words mean neither more nor less than if they had been 'I grant firstly the salmon fishery called the Ballyshannon salmon fishery enjoyed by Alicia Shiel.'" Lord Bramwell's *argumentum a preposteroso* would scarcely have been employed if he had seen, as we have, the earlier Crown grants in which the identical rights the grant of which he says "is preposterous on what one may call the face of it" were actually granted, with even more extensive ones, to the parties from whom Conolly had purchased them in 1719. Lord FitzGerald says that "what was described here and what was intended to be conveyed is not a general and exclusive fishery from one end of the River Erne to the other, from its source to its mouth, but that fishery which Thomas Conolly had, and which it appears equally clearly from the conveyance was in the hands of the lessees. In fact the leases to the Shiels reserved all that he had; and what the party here claims, *and what he got by the conveyance*, was first the rent of £1,200 a year reserved by the lease to the Shiels, and, when the Shiels lease terminated, *the right to the reversion and enjoyment of that which they had*, namely the Conolly fishery." "No one can doubt, upon the documents and upon the evidence now before us, that at the time of the execution of this conveyance Thomas Conolly had an extensive and very valuable fishery popularly known as the Ballyshannon fishery, and which was probably derived at some unknown period from a royal grant. I say so because we find that there was a quit rent reserved and we know that in Ireland quit rents were only reserved in grants from the Crown. We know also that, in addition to this fishery at the mouth of the river, a fishery in the upper waters is only valuable as a breeding ground for the fish which will eventually descend the river and come up again and be captured at the weirs; but we know from the succession of Caldwell deeds that Thomas Conolly acquired certain riparian rights quite consistent with the rights of other riparian proprietors. Those rights were what the Shiels had under the lease; those rights were what was bargained for, and for which the purchaser gave £45,000; and we give full effect to that transaction." The Lords held, affirming

the Common Pleas Division, that certain eel-fishings in the non-tidal waters of Lough Erne, which neither Thomas Conolly, nor, so far as the evidence went, any of his ffolliott predecessors, had ever enjoyed or possessed, but which had been continuously enjoyed and possessed by the Marquis of Ely as a riparian proprietor, did not pass under the comprehensive words of the Landed Estates conveyance, but the passages which I have cited show that the Lords did not express any doubt that the Ballyshannon fishery which was at the time under lease from Conolly to the Shiels, was effectually conveyed to, and vested in him by the Landed Estates Court conveyance. As I have already said, the opinions expressed by their Lordships were only *obiter* as regards the Ballyshannon fishery, and the decision of this Court has concluded the matter so far as we are concerned.

Upon the whole case, while I agree with the other members of the Court that there is no evidence from which we could presume that a several fishery existed in the tidal navigable waters of the River Erne at any date prior to the year 1189, I consider that, upon the true construction of the statutes 10 Car. I and 15 Car. I and the Letters Patent to Thomas Lord ffolliott, there was a valid grant of the several fishery claimed in this action, and I express no opinion upon the question whether a valid grant was made either by Queen Elizabeth or by King James I or by King Charles I before the restrictions imposed by Magna Charta upon the exercise of the royal prerogative were extended to what is now the County of Donegal.

(1) Before Kennedy C.J., FitzGibbon and Murnaghan JJ.

(1) 10 H. L. C. 593.

(2) 8 App. Cas. 135.

(3) [1914] A. C. 153, at pp. 168-170.

(1) Dav. Rep. 149, at p. 152.

(2) 10 H. L. C. 593.

(3) Dav. Rep. 78, at pp. 101 *et seq*.

(4) 5 Ir. Ch. R. 229, at p. 234.

(5) 7 App. Cas. 633, at p. 654.

(1) 4 Burr. 2162.

(2) 23 L. T. 732, at p. 736.

(3) L. R. 5 Ex. 127.

(4) I. R. 8 C. L. 68.

(5) [1897] 1 I. R. 140.

(6) [1921] 1 A. C. 413.

(7) [1919] 2 Ch. 197; [1920] A. C. 508.

(8) [1927] I. R. 406, at p. 433.

(9) 5 Ir. Ch. R. 229, at p. 233.

(10) 10 H. L. C. 593, at p. 618.

(11) 8 App. Cas. 135, at pp. 158, 179, 181.

(1) 10 H. L. C. 593, at p. 618.

(2) 8 App. Cas. 135, at pp. 139, 181, 183.

(3) [1914] A. C. 153, at p. 171.

(4) 10 H. L. C. 593, at p. 618.

(5) 8 App. Cas. 135, at p. 162.

(1) I. R. 8 C. L. 68, at p. 107.

(2) 8 I. C. L. R. 279; 11 I. C. L. R. 63, at p. 84.

(3) 7 App. Cas. 633.

(4) [1897] 1 I. R. 140, at p. 145.

(5) [1905] 1 I. R. 483, at p. 526.

(1) 10 Ir. Ch. R. 421, at p. 432.

(2) 9 Ir. C. L. R. 132, at pp. 143, 148.

(3) [1891] A. C. 228, at p. 234.

(4) [1904] A. C. 476, at p. 491.

(5) 3 App. Cas, 641, at p. 653.

(6) 8 Ir. L. R. 43, at p. 50.

(7) [1891] 2 Ch. 678, at p. 695.

(8) 5 Ir. Jur. N. S. 185.

(9) 5 Ir. Ch. R. 229.

(10) 11 Ir. C. L. R. 63, at p. 71.

(11) 1 Hud. & B. 322.

(12) [1927] I. R. 406.

(13) Unreported.

(1) [1911] A. C. 552, at pp. 601 et seq.

(1) 11 H. L. C. 62, at pp. 83, 93, 98.

(2) 6 De G. M. & G. 1, at p. 20.

(1) Dav. Rep. 149, at p. 152.

(2) L. R. 15 Eq. 51.

(3) 10 Ch. D. 518, at p. 527.

(1) [1927] I. R. 406.

(2) [1929] I. R. at p. 210.

(3) [1927] I. R. at p. 451.

(1) [1927] I. R. 406.

(2) Unreported.

(1) Dav. Rep. 149.

(1) Dav. Rep. 149.

(1) 10 H. L. C. 593.

(2) 8 App. Cas. 135.

(3) At p. 180.

(1) 10 H. L. C. 593, at p. 618.

(2) Dav. Rep. 78.

(1) Dav. Rep. 78.

(1) Dav. Rep. 78.

(1) [1914] A. C. 153.

(2) 8 App. Cas. 135, at p. 180.

(1) Dav. Rep. 149.

(1) 10 H. L. C. 593, at p. 620.

(2) Calendar of the Patent and Close Rolls of Chancery in Ireland, No. 23 of 8 Eliz.

(3) Calendar of the Patent and Close Rolls of Chancery in Ireland, No. 34 of 43 Eliz.

(1) 5 Ir. Jur. N. S. 185.

(2) 10 H. L. C. 593.

(3) [1914] A. C. 153, at p. 170.

(1) 10 H. L. C. 593, at p. 618.

(2) 10 H. L. C. 593.

(1) 10 H. L. C. 593.

(2) [1914] A. C. 153.

(3) L. R. 5 Ex. 127.

(4) 8 App. Cas. 135, at pp. 179, 180.

(1) 10 H. L. C. 593.

(2) 8 App. Cas. 135.

(1) Sir J. Davies, "Discovery,"p. 15.

(2) 5 Ir. Ch. R. at p. 234.

(3) 10 H. L. C. at p. 620.

(4) [1927] I. R. 406, at pp. 422-7.

(5) 1 Inst. 141 b.

(6) 7 Rep. 1, at p. 17 b.

(1) Sir J. Davies, "Discovery,"p. 173.

(2) Ibid. at pp. 176-7.

(3) Davies' Reports 78, at p. 101.

(1) Davies, "Discovery," p. 79.

(2) [1927] I. R. 406, at p. 427.

(1) "Discovery," p. 37.

(2) Ibid. p. 191.

(3) Ibid. p. 197.

(1) 20 St. Tr. 239.

(2) At p. 324.

(3) 20 St. Tr. 81.

(4) 3 Knapp, 130, at p. 152.

(1) 10 H. L. C. 593.

(2) Davies' Reports, 111.

(1) Davies' Reports, 109.

(2) 20 St. Tr. 239.

(1) [1914] A. C. 153.

(1) 15 Car. 1, c. 6.

(1) 3 Cl. & F. 335, at p. 353.

(1) I. R. 2 C. L. 519, n.

(2) [1900] 2 I. R. 161.

(1) Unreported.